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No. 15762

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ELWARD BAKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

LAUGHLIN E. WATERS,
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PAUL P. O'BRIEN, CLERK

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No. 15762
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

ELWARD BAKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.
JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of the United States District Court for the Southern District of California, which adjudged the appellant to be guilty of a certain count of an indictment (see Statement of Case, below), which indictment was brought under the provisions of Section 2421 of Title 18, United States Code. [R. pp. 373-374.]

The violations are alleged to have occurred in Los Angeles County, California, within the Central Division of the Southern District of California. [R. p. 65.]

The jurisdiction of the District Court is based upon Section 3231, of Title 18, United States Code. This

court has jurisdiction to entertain this appeal and to review the proceedings leading to said judgment by reason of the provisions of Sections 1291 and 1294 of Title 28, United States Code.

II.

STATEMENT OF THE CASE.

An indictment in one count was filed on July 3, 1957, charging the appellant essentially as follows:

On or about April 1, 1957, the appellant knowingly transported a woman, Sally Sisneros, in interstate commerce, from Phoenix, Arizona, to Los Angeles County, California, for prostitution, debauchery and other immoral purposes.

This indictment was superseded by a new indictment in two counts filed on July 24, 1957, charging the appellant essentially as follows:

Count I, on or about April 1, 1957, the appellant knowingly transported a woman, Sally Sisneros, in interstate commerce, from Phoenix, Arizona, to Los Angeles County, California, for prostitution, debauchery and other immoral purposes;

Count II, on or about April 1, 1957, the appellant knowingly transported a woman, Sally Sisneros, in interstate commerce, from Las Vegas, Nevada, to Los Angeles County, California, for prostitution, debauchery and other immoral purposes.

The defendant below pleaded not guilty to the first indictment [R. p. 9], and not guilty to both counts of the superseding indictment [R. p. 26]. On the 22nd of July, when it was learned that the government was preparing a superseding indictment, counsel for the defendant

moved for a continuance of the trial date in order to prepare against the new indictment. [R. p. 20.] Said motion was granted and the trial date continued to August 13, 1957. [R. p. 21.] On July 8, 1957, prior to the first arraignment, Mr. Benton was appointed as counsel for the defendant below. [R. p. 4.]

On July 22, 1957, Mr. Benton made a motion to be relieved as counsel, which motion was granted. [R. pp. 15-16.]

On July 29, 1957, Mr. Philip S. Schutz appeared as counsel for the defendant below. [R. p. 25.]

On August 13, 1957, Mr. Schutz asked to be relieved as counsel. [R. pp. 29-33.]

On August 15, 1957, Mr. Schutz appeared as counsel and participated in the selection of the jury. [R. pp. 62-84.]

On August 16, 1957, Mr. Benton again appeared and represented the appellant throughout the remainder of trial. [R. p. 89.] Prior to the commencement of the trial, Mr. Benton made a motion for a continuance inasmuch as he felt inadequately prepared. [R. p. 89.] This motion was denied. [R. pp. 89-94.]

Trial commenced on August 16, 1957 [R. p. 94] and resulted in a verdict of not guilty as to count one and guilty as to count two against the appellant. [R. p. 384.] Appellant had moved for a judgment of acquittal at the close of the Government's case [R. p. 324], and renewed it [R. pp. 325-326, 392], which was denied.

Judgment was entered on September 9, 1957. [R. p. 397.] Notice of appeal was filed on September 16, 1957.

III.

STATEMENT OF THE FACTS.

The record shows that while the appellant was in Phoenix, Arizona, he was, by his own admission, a hustler of girls [R. pp. 222-224] and a narcotics pusher. [R. pp. 108-109.]

The appellant met the victim at a holiday party in December of 1956. [R. p. 102.] The victim commenced living with the appellant thereafter. [R. p. 104.] The appellant induced the victim to become a prostitute for him. [R. pp. 104-116, 170-171.] The victim worked as a prostitute in the Mexican labor camps around Phoenix [R. pp. 106-115] and on the streets. [R. pp. 118-119.] While the victim was working as a prostitute she gave her earnings to the appellant. [R. pp. 112, 119, 123, 127, 247.]

The appellant took the victim from Phoenix to Las Vegas in February 1957 so that she could work in the latter city as a prostitute. [R. p. 120.]

The appellant and the victim returned to Phoenix separately but the victim again commenced working for the appellant as a prostitute. [R. p. 127.]

The appellant told the victim that they were going to leave Phoenix and go to Los Angeles and that she would work as a prostitute in Los Angeles. [R. pp. 127-128, 133.]

On March 30, 1957 they left Phoenix [R. pp. 231-232] and traveled to Las Vegas. [R. p. 129.] While they were in Las Vegas the second time, the victim worked as a prostitute. [R. p. 132.] They stayed in Las Vegas for four or five days. [R. p. 246.]

The appellant again stated that he was going to take the victim to Los Angeles and have her work as a prostitute there. [R. p. 133.] The appellant then took the victim from Las Vegas to Los Angeles. [R. p. 133.] He introduced her to some other girls upon arriving in Los Angeles [R. p. 134], one of whom was thought to be a prostitute. [R. p. 136.] The appellant and the victim lived together for several days at the Hayes Motel [R. p. 137] and the victim had sexual intercourse with the appellant and with a sailor who had been procured by the appellant and another man. [R. pp. 136-143.] This other man, known as Smitty, had been introduced to the victim by the appellant. [R. pp. 137-138.] He was supposed to show the victim places to work out of and actually did show the victim such places. [R. p. 138.] The appellant introduced the victim to another girl, Barbara Garcia, a prostitute, who was going to show the victim the streets. [R. pp. 144-146.] The victim was reluctant to work as a prostitute and did not push herself in the trade. [R. pp. 143-144.]

IV. ARGUMENT.

The appellant contends in his opening brief and in his statement of points in the transcript of the record the issues to be:

A. Sufficiency of the Evidence.

That the Government failed to establish the elements of the crime of which the appellant was convicted.

However, it is submitted that the elements of the alleged crime were established and that the verdict of

the jury as to count two of the indictment was a proper one.

The indictment was in two counts. Count one charged the defendant with transportation of a woman in interstate commerce for purposes of prostitution, debauchery or other immoral purposes in that he took the victim Sally Sisneros from Phoenix, Arizona, to Los Angeles County, California. Count two alleged the transportation of the victim from Las Vegas, Nevada to Los Angeles County, California for the same purposes on or about the same date April 1, 1957 [Tr. p. 393, lines 2-17.] The appellant was acquitted on count one but was convicted on count two. Therefore, as to this point, we are not here concerned with whether or not the elements of count one were established but only as to the elements of count two since that is the count upon which the appellant was convicted.

Unrebutted testimony clearly shows that the appellant was in Las Vegas, Nevada with the victim and had in his possession a particular type automobile [Tr. pp. 130-133; p. 244, lines 11-18; p. 246, lines 20-24]; that he was seen in Los Angeles County, California a few days later [Tr. p. 257, lines 3-25; p. 258, lines 1-5]; with the same automobile [Tr. pp. 267, 275, 279]; that he was the one who had actually transported the victim across the Nevada-California border [Tr. p. 133, lines 14-25; p. 134, lines 1-11]; that he had induced the victim to become a prostitute for him in Phoenix, Arizona [Tr. pp. 104-116; p. 170, lines 9-25; p. 171, lines 1-4]; that she had worked for him as a prostitute giving the monies acquired from her trade to the appellant [Tr. p. 119, lines 2-15; p. 112, lines 2-21; p. 123, lines 2-8; p. 127, lines 8-13; p. 247, lines 1-24]; that he intended to take

the victim to Los Angeles, California [Tr. p. 127, lines 14-25; p. 128, lines 1-4; p. 133, lines 1-20]; that he intended her to work as a prostitute after their arrival in Los Angeles [Tr. p. 128, lines 5-19; p. 133, lines 1-20]; that he in fact had her work as a prostitute after their arrival in Los Angeles. [Tr. starting p. 134, line 18, to p. 144, line 19; pp. 258-260.] Such evidence is sufficient upon which a jury could base a conviction for violation of 18 U. S. C. 2421.

B.

Evidence Based on Illegal Act.

That the evidence was based upon an illegal act of the Phoenix and Arizona law enforcement agencies by floating the appellant out of Phoenix and out of Arizona and that he was compelled by said officers to take with him the victim.

The Government contends that the appellant took the victim with him when he left Phoenix, Arizona of his own free will and choice and that this had been his intention prior to the date of actual leaving. At no place in the testimony of the officers, either direct or on cross-examination did they state that they ordered the appellant to leave town or the state of Arizona. The only testimony to the effect that the appellant was asked to leave town was from the victim who stated that the appellant had told her that he was told to leave the city and the state, which is only hearsay. [Tr. p. 202, lines 10-18.] The victim testified before the officers testified. Counsel for the defendant was at least aware at this stage of the trial that the defendant-appellant may have been ordered to leave the city and state. If there was real merit in

his contention, why didn't he pursue the matter further on cross-examination of the officers?

Assuming for the sake of argument that the appellant had been asked to leave town, he still had a perfect right to remain. There is prior testimony to the effect that the appellant told the victim that they were going to leave Phoenix and go to Los Angeles and that he was going to have her work as a prostitute at the latter city. This shows that he had the independent intention to go somewhere else to continue in his hustling activities.

The gist of the crime is the transportation of a woman. It is submitted that the woman who was the victim, was not forced to leave, nor was the appellant forced to take her across a state line. [Tr. p. 203, lines 9-12; p. 216, lines 11-17.] The victim testified that she wanted to go with the appellant; that she had not been forced to leave the city or state. The officers testified that when one of them went to the victim's apartment on the night that she and the appellant left town, that she had the clothes and belongings of each packed together in suitcases and was herself ready to leave town with the appellant. [Tr. p. 232, lines 5-25; p. 233, lines 1-23.] The officers testified that they had been told by the appellant on the day of his leaving Phoenix, that he was leaving town. [Tr. p. 231, lines 2-25.] Even though an officer at this point decided to see that the appellant was sincere about leaving by escorting him out of town, it seems obvious that the appellant intended to take the victim with him, else why would the victim have been in her apartment sitting on luggage which contained both the belongings of the victim and the appellant. Regardless of the actions of the officers, the appellant may have had

an independent intention to take the victim with him. The evidence was such that the jury could have so found.

There is no merit to the contention that force was the reason why the appellant took the victim from Las Vegas to Los Angeles. Assuming for the sake of argument that he was forced to leave Arizona, once beyond the borders of that State, there was no compulsion to go further. He was convicted of transporting a woman from Las Vegas to Los Angeles and he was in no way forced by any law enforcement agency to make that trip.

C.

Error of Trial Court—Denial of Continuance.

That the trial court erred in denying the defendant's motion for a continuance after Mr. Benton had been substituted as counsel for Mr. Schutz. It is the contention of the appellant that such a ruling constituted a denial of the appellant's right and that the appellant, with counsel, was not able to adequately prepare his defense for trial, to be represented by counsel. However, the facts do not support such a contention. (See Statement of the Case.) Mr. Benton was originally appointed as counsel for the defendant-appellant from the Federal Indigent Panel on July 8, 1957 at which time the defendant-appellant was arraigned and made his plea. On July 9, 1957 appellant's motion to reduce bail was granted. The trial was then set for July 29, 1957. On July 22, 1957, Mr. Benton made a motion to be relieved as counsel since he felt the defendant was not an indigent. This motion was granted. At this time, Mr. Benton showed that he had a good understanding of the case and indicated that the defendant was preparing a substantial defense. He further indicated that the defendant had retained other counsel, Mr.

Schutz. The defendant was arraigned on a superseding indictment on the 29th day of July at which time Mr. Schutz appeared and the two indictments were set for trial on August 13, 1957. Both indictments arose out of the same fact situation.

On August 13, 1957, Mr. Schutz asked to be relieved as counsel. At this time, the defendant stated in court that he did not wish Mr. Schutz to represent him. The court then told the defendant to obtain counsel and that the matter would be continued until August 15, 1957. Mr. Schutz was present on the 15th and represented the defendant in the selection of the jury. The defendant at this time made the representation that he would like to have Mr. Benton represent him as counsel and that he had talked to Mr. Benton about this but had not actually retained him. The defendant was instructed to contact Mr. Benton and have him as counsel in the further proceedings of the trial which were continued until August 16, 1957.

On August 16, 1957, Mr. Benton's motion for a continuance was denied on the grounds that he had represented the defendant from July 8, 1957 to July 22, 1957 and should have been aware of the facts of the case sufficiently enough to make adequate representations. [R. pp. 89-94.]

The entire transcript will show that the defendant-appellant was well represented by counsel at all stages of the proceedings. He had ample opportunity to hire counsel of his own choosing prior to the date of trial and even after the original trial date, the matter was extended to give the defendant more time to prepare adequately for trial. That he did not act in good faith in

procuring counsel is shown by the record. The fact that he had ample opportunity to employ counsel is sufficient. [See Court's Statement, R. p. 397.]

A leading case which is very similar to the present fact situation is *Neufield v. United States*, 1941, 118 F. 2d 375, 73 App. D. C. 174, *cert. den.*, 315 U. S. 798, 62 S. Ct. 580, 86 L. Ed. 1199. Among other things, it holds the following: The granting or refusal of a continuance is a matter of discretion of the judge to whom application is made; Such a ruling will not be reversed except for abuse of discretion; The fact standing alone, that a continuance has been denied, does not constitute a denial of the constitutional right to "assistance of counsel"; A party seeking a continuance must make a showing that a continuance is reasonably necessary for a just determination of the cause; and if a continuance is sought for purpose of securing attendance of witnesses, it must be shown who they are, what their testimony would be, that it would be relevant and competent, that witnesses can probably be obtained if continuance is granted, and that due diligence has been used to obtain attendance at the trial as set; An accused aware of his right to counsel and able to obtain counsel himself cannot over an extended time omit to take any steps towards retaining counsel for trial proper and cannot properly complain if trial court, on morning when case was called for trial, appoints counsel who had been previously retained for reduction of bond. See also: *Avery v. Alabama*, 1940, 308 U. S. 444, 60 S. Ct. 321, 84 L. Ed. 377; *Isaacs v. United States*, 1895, 159 U. S. 487, 16 S. Ct. 51, 40 L. Ed. 229; *Tomlinson v. United States*, 1937, 68 App. D. C. 106, 93 F. 2d 652, *cert. den.* 1938, 303 U. S. 646, 58 S. Ct. 645, 82 L. Ed. 1107.

D.

Contradictory Counts.

That the two indictments (counts) are contradictory and mutually exclusive, thereby making it impossible to defend to both indictments (counts) at the same time.

It is submitted that the test for determining whether or not a pleading is proper is based upon common law principles and which are set forth in the Sixth Amendment to the Constitution: the defendant shall be informed of the nature and cause of the accusation. The courts have established two principles by which these questions may be decided: one, is the pleading certain enough so that the defendant may plead jeopardy if a subsequent indictment is filed; two, is the pleading certain enough to enable the defendant to prepare his defense. *Rosen v. United States*, 161 U. S. 30, 16 S. Ct. 434, 480, 40 L. Ed. 606; *United States v. Arviles*, D. C. Cal. 1915, 222 F. 474; *United States v. Allied Chemical and Dye Corp.*, D. C. N. Y. 1941, 42 F. Supp. 425; *White v. United States*, C. C. A. Okla. 1933, 67 F. 2d 71; *United States v. Potter*, C. C. Mass. 1892, 56 F. 83, reversed on other grounds 155 U. S. 438, 15 S. Ct. 144.

To satisfy this test, each count must be examined by itself to see if it is certain enough to meet the above requirements. Each count of the indictment stated with specificity the charge and the facts leading to the charge so that the defendant was apprised of the nature of the accusation. The dates, places, persons and acts involved were all set forth so that the defendant could not be placed in jeopardy by a subsequent indictment, and were certain enough to permit the defendant to prepare his defense. Both counts arose out of closely connected acts,

or facts which showed acts within a limited time and space. Even though count two alleged facts contained within count one, each count within itself meets the above requirements of certainty.

The court properly instructed the jury that the defendant may not be convicted of both counts but only upon one or the other or neither. [Rep. Tr. p. 373, lines 18-24.]

Conclusion.

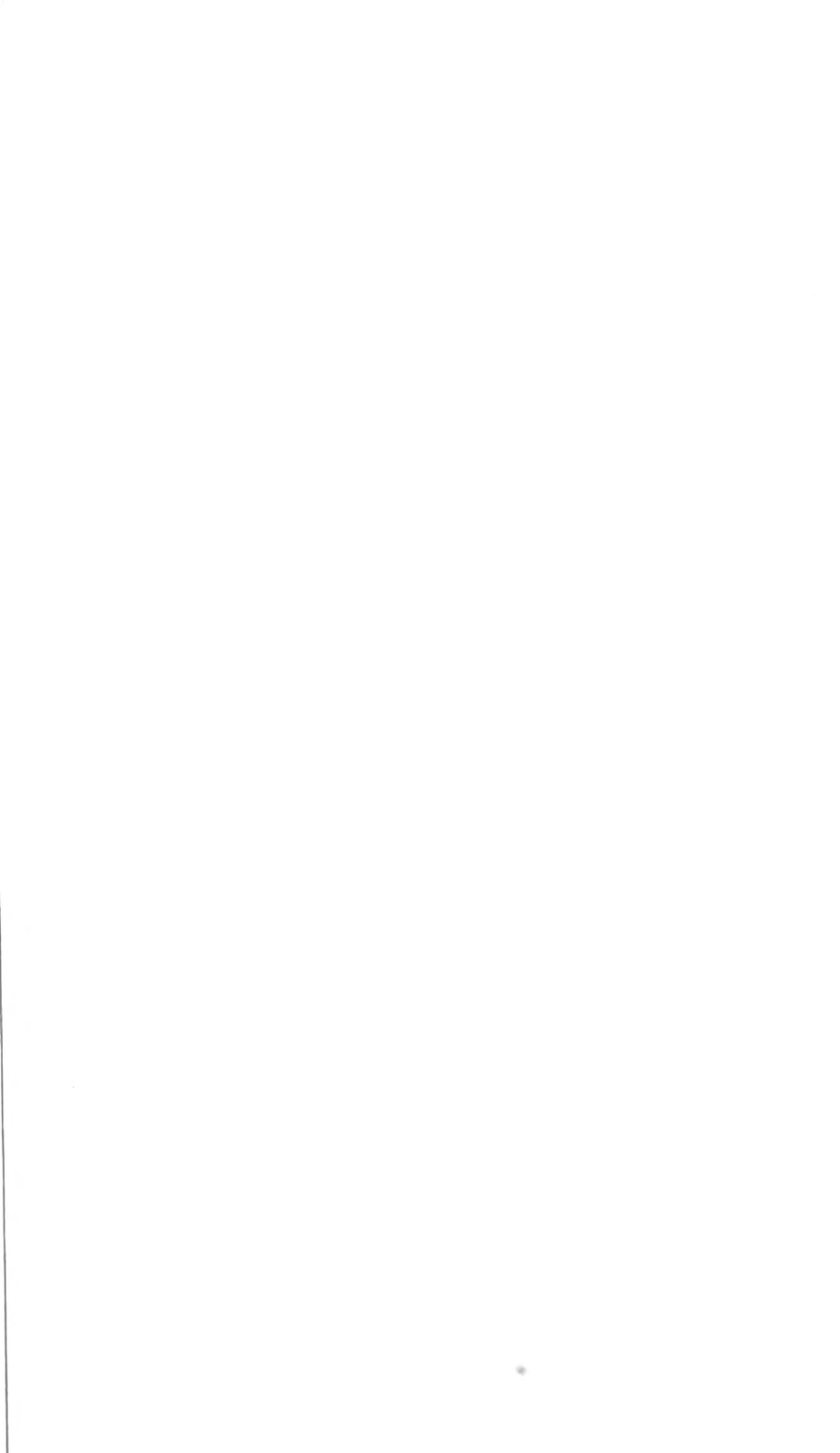
We submit that the trial court committed no error in that the evidence was sufficient to find a violation of the law as charged; that no illegal evidence was admitted which affected the rights of the appellant; that the denial of the motion for continuance by counsel on August 16, 1957 was proper and did not violate the appellant's right to assistance of counsel; that the indictment was definite and certain as to each separate count thereby enabling the appellant to be apprised of the charge and that it was stated with certainty and definiteness so that no danger of a second indictment could be urged on the same alleged facts.

Respectfully submitted,

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United States Attorney,

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Assistant U. S. Attorney,
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No. 15,764

IN THE

**United States Court of Appeals
For the Ninth Circuit**

IVY L. VARNELL,

Appellant,

VS.

HOMER W. SWIRES, d/b/a H. W. SWIRES
CONSTRUCTION and EMPLOYERS' MUTUAL
CASUALTY COMPANY, a corporation,

Appellees.

**Appeal from the District Court for the
District of Alaska, Third Division.**

BRIEF FOR APPELLEES.

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No. 15,764

IN THE

**United States Court of Appeals
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IVY L. VARNELL,

Appellant,

VS.

HOMER W. SWIRES, d/b/a H. W. SWIRES

CONSTRUCTION and EMPLOYERS' MUTUAL

CASUALTY COMPANY, a corporation,

Appellees.

Appeal from the District Court for the
District of Alaska, Third Division.

BRIEF FOR APPELLEES.

I.

**STATEMENT RELATING TO PLEADINGS
AND JURISDICTION.**

This is an appeal taken from a final judgment rendered on the 11th day of June, 1957, by the District Court, Territory of Alaska, Third Judicial Division, in favor of the appellees (defendants in the lower Court) and against the appellant (plaintiff in the lower Court) (R. 39).

The District Court for the Territory of Alaska is a Court of general jurisdiction consisting of four

divisions of which the Third Division is one. Jurisdiction in the District Court is conferred by Title 48, U.S.C. Section 101. See also Alaska Compiled Laws Annotated, 1949, 53-2-1. Practice of procedure in the District Court since July 18, 1949, has been controlled by the Federal Rules of Civil Procedure which were extended to the District Court for the District of Alaska on that date. 63 Stat. 445, 48 U.S.C. 103a.

Jurisdiction of this Court to review the judgment of the District Court is conferred by new title 48, U.S.C. Sections 1291 and 1294 and is governed by the Federal Rules of Civil Procedure.

II.

STATEMENT OF FACTS.

Appellant commenced this action in the Court below on the 21st day of November, 1957, by filing his complaint and having summons issued. Process was served on the defendants who responded by motion to dismiss, the same being granted. Appellant served and filed his amended complaint on the 14th day of March, 1947 (R. 1) alleging facts purporting to state a claim for relief under "The Workmen's Compensation Act of Alaska" (43-3-39 ACLA 1949) commencing with Sections 43-3-1 ACLA 1949 through 43-3-39 ACLA 1949. Thereafter appellees filed their motion to dismiss (R. 8), such motion being granted and judgment entered (R. 39). The record herein reflects that the appellant objected to the proposed judgment as submitted by the appellees after their first motion

to dismiss had been granted (R. 32) but the record reflects no further objection was made with regard to the judgment of record (R. 39). Appellant did file motion for rehearing on appellees' motion to dismiss amended complaint on the 15th day of April, 1957 (R. 33), which was denied.

III.

SUMMARY OF ARGUMENT.

Appellees submit that the trial Court properly dismissed plaintiff's complaint, properly allowed appellant to amend and properly dismissed plaintiff's amended complaint with prejudice denying its motion for rehearing and entered judgment in favor of the appellees. Appellees concede that on a motion to dismiss all facts well pled in the pleadings sought to be dismissed are admitted but for the purpose of the motion only. Appellees' motion to dismiss attacks appellant's amended complaint on the grounds that the Workmen's Compensation Act of Alaska was the appellant's exclusive remedy; that the Alaska Industrial Board had original jurisdiction of matters complained of in appellant's amended complaint; and that the Alaska Workmen's Compensation Act of Alaska does not provide for the type of attachment sought by appellant's amended complaint (R. 8). Plaintiff's amended complaint recited that the plaintiff brought his action for attachment of property as security for the payment of compensation and likewise prayed for judgment against the appellees for

compensation allegedly due together with penalties (R. 1).

Appellant contends that after having been granted an award (R. 6) and no appeal is filed therefrom and the employer and insurer shall fail to provide the temporary compensation and medical care, that the appellant is entitled then to maintain an action for attachment of property of the employer or the insurer as security. It is singularly noteworthy that in no place in the argument of the appellant does he state that the award, as made and appearing in the record, has not been paid by the insurer. It is likewise noteworthy to observe that the award grants the appellant compensation for temporary total disability commencing on the 31st day of July, 1956, and ending on the 31st day of October, 1956. Section 43-3-10 ACLA 1949 provides:

“The right to compensation for an injury and the remedy therefore granted by this Act shall be in lieu of all rights and remedies as to such injury now existing either at common law or otherwise, and no rights or remedies, except those provided for by this Act, shall accrue to employees entitled to compensation under this Act while it is in effect; nor shall any right or remedy, except those provided for by this Act accrue to the personal or legal representatives, dependents, beneficiaries under this Act, or next of kin of such employee; provided, however, that if an employer fails to secure the payment of compensation as required by this Act, by insuring with an authorized insurance carrier or by meeting the requirements for self-insurance, then any

injured employee, or, in case of death, his or her beneficiaries, may, at his, her or their option, elect to claim compensation under this Act or to maintain an action in the courts for damages on account of such injury or death; and, in the event of his, her or their election to bring such action it shall not be necessary to plead or prove freedom from contributory negligence, nor may the defendant employer plead or prove as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due, in whole or in part, to the contributory negligence of the employee."

Appellant finds his remedy in Section 43-3-5, which provides:

"Every employee and every beneficiary entitled to compensation under the provisions of this act shall have a lien for the full amount of such compensation, including costs and disbursements of suit and attorneys' fee therein allowed or fixed, upon all of the property in connection with the construction, preservation, maintenance or operation of which the work of such injured or deceased employee was being performed at the time of the injury or death of such employee. For example: In the case of an employee injured or killed while engaged in mining or in any work connected with mining, the lien shall extend to the entire mine and all property used in connection therewith; and in the case of an employee injured or killed while engaged in fishing or in the packing, canning or salting of fish, or other branch of the fish industry, the lien shall extend to the entire packing, fishing, salting or canning

compensation allegedly due together with penalties (R. 1).

Appellant contends that after having been granted an award (R. 6) and no appeal is filed therefrom and the employer and insurer shall fail to provide the temporary compensation and medical care, that the appellant is entitled then to maintain an action for attachment of property of the employer or the insurer as security. It is singularly noteworthy that in no place in the argument of the appellant does he state that the award, as made and appearing in the record, has not been paid by the insurer. It is likewise noteworthy to observe that the award grants the appellant compensation for temporary total disability commencing on the 31st day of July, 1956, and ending on the 31st day of October, 1956. Section 43-3-10 ACLA 1949 provides:

“The right to compensation for an injury and the remedy therefore granted by this Act shall be in lieu of all rights and remedies as to such injury now existing either at common law or otherwise, and no rights or remedies, except those provided for by this Act, shall accrue to employees entitled to compensation under this Act while it is in effect; nor shall any right or remedy, except those provided for by this Act accrue to the personal or legal representatives, dependents, beneficiaries under this Act, or next of kin of such employee; provided, however, that if an employer fails to secure the payment of compensation as required by this Act, by insuring with an authorized insurance carrier or by meeting the requirements for self-insurance, then any

injured employee, or, in case of death, his or her beneficiaries, may, at his, her or their option, elect to claim compensation under this Act or to maintain an action in the courts for damages on account of such injury or death; and, in the event of his, her or their election to bring such action it shall not be necessary to plead or prove freedom from contributory negligence, nor may the defendant employer plead or prove as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due, in whole or in part, to the contributory negligence of the employee."

Appellant finds his remedy in Section 43-3-5, which provides:

"Every employee and every beneficiary entitled to compensation under the provisions of this act shall have a lien for the full amount of such compensation, including costs and disbursements of suit and attorneys' fee therein allowed or fixed, upon all of the property in connection with the construction, preservation, maintenance or operation of which the work of such injured or deceased employee was being performed at the time of the injury or death of such employee. For example: In the case of an employee injured or killed while engaged in mining or in any work connected with mining, the lien shall extend to the entire mine and all property used in connection therewith; and in the case of an employee injured or killed while engaged in fishing or in the packing, canning or salting of fish, or other branch of the fish industry, the lien shall extend to the entire packing, fishing, salting or canning

plant or establishment and all property used in connection therewith; and the same shall be the case with all other businesses, industries, works, occupations and employments. The lien herein provided for shall be prior and paramount and superior to any other lien of the property affected thereby, except liens for wages or materials as is now or may hereafter be provided by law, and shall be of equal rank with all such liens for wages or materials. The lien hereby provided for shall extend to and cover all right, title, interest and claim of the employer of, in, and to the property affected by such lien. Any person claiming a lien under this Act shall, within four months after the date of the injury from which the claim of compensation arises, file for record in the office of the recorder of the precinct in which the property affected by such lien is situated a notice of lien signed and verified by the claimant or someone on his or her behalf, and stating substance, the name of the person injured or killed out of which injury or death the claim of compensation arises, the name of the employer of such injured or deceased person at the time of such injury or death, a description of the property affected or covered by the lien so claimed, and the name of the owner or reputed owner of such property.

“The lien for compensation herein provided may be enforced by a suit in equity as in the case of the enforcement of other liens upon real or personal property, at any time within ten months after the cause of action shall arise. Nothing in this Section contained shall be deemed to prevent an attachment of property as security for

the payment of any compensation as in this Act provided.”

Appellees contend that the Workmen’s Compensation Act of Alaska, an integrated act complete in and of itself, and as such provides exclusive remedies and does not contemplate an independent proceeding in the District Court for the attachment of property of the employer or insurer but rather provides for concurrent remedies and penalties contained in the act as well as procedures when a claim is disputed.

Appellant next contends that the District Court exceeded its authority by awarding attorney fees to the defendant insurance company after adjudging plaintiff’s claim against defendants be dismissed with prejudice. (Appellant’s Brief 10 and 32.) Appellees contend, as the record reflects (R. 39) that the judgment awarded attorney fees not to the insurer alone but to the defendants and that the District Court did not exceed its authority to award attorney fees to the defendants on the dismissal of the action of the plaintiff.

Appellant next contends that the lower Court erred and abused its discretion in dismissing the appellant’s amended complaint with prejudice and without leave to amend. (Appellant’s Brief 11 and 35.) Appellees contend that the District Court did not abuse its discretion in dismissing the appellant’s amended complaint, with prejudice, and in fact no prejudice is involved in such action as such turns on the question of law, nor did it abuse its discretion is not granting

leave to amend inasmuch as the record is bare as to any application made by the appellant for leave to amend as the Federal Rules of Civil Procedure, Rule 15a, allows a party to amend his pleading once as a matter of course at any time before a responsive pleading is served, which the record reflects was done, but thereafter he may amend only by leave of the Court, and the record fails to reflect that any such leave was applied for.

IV.

ARGUMENT.

Appellant contends that he is entitled to bring an independent civil action in the District Court for temporary disability compensation benefits and to attach property of the employer or his insurer as security for the payment thereof. Appellant refers to Section 43-3-3, ACLA 1949, which requires that all compensation for temporary disability be paid periodically directly to the injured employee without waiting for an award by the board. It appears by the record (R. 6) that the appellant was entitled to compensation for temporary disability for a period from July 31, 1956, to October 31, 1956. This sum has been paid (R. 3). Appellant further contends that by virtue of the fact that the act provides that provisions of this act are made a part of every contract for hire, that the appellant can therefore commence an action independent of the act for the attachment of property as security for compensation al-

legedly due him under the act. It is clear from the act that no such intention is manifested anywhere therein. On the contrary, there is expressed a definite intention that the remedy provided by the act shall be exclusive. Section 43-3-10, ACLA 1949, provides:

*“The right to compensation for injury and the remedy therefore granted by this act shall be in lieu of all rights and remedies as to such injury now existing, either at common law or otherwise, and no rights or remedies except those provided for by this act shall accrue to employees entitled to compensation under this act while it is in effect * * *.”* (Emphasis supplied.)

Carrying appellant's argument to its logical conclusion, this would allow an injured workman to immediately, upon injury, file a claim with the Board and simultaneously commence an independent action in the District Court to secure compensation allegedly due him by way of attachment of property of the employer or insurer though the claim was controverted by the employer and insurer as a noncompensable claim. Appellant purports to find this alleged remedy in Section 43-3-5 ACLA 1949, in the last paragraph thereof which provides in part:

“ * * Nothing in this section contained shall be deemed to prevent an attachment of property as security for the payment of any compensation as in this Act provided.”*

Appellees submit that the provision above quoted does not create a remedy on behalf of the employee nor does it indicate any intention that the employee has available to him any remedy outside the act. It

regard to adjudicated temporary disability is without basis in the record.

The appellant's chief complaint as contained in his brief appearing in the argument is that the Alaska Workmen's Compensation Act and the Alaska Industrial Board are inadequate to provide and care for the needs of injured workmen. Whether this is so in fact is arguable. However, in the event if such be the case, this is a question for the Legislature and not for the Courts. The accusation of misconduct on the part of the insurance carrier here is completely without foundation and supported only by the affidavit of counsel for the appellant and is categorically denied.

Appellant attributes to the appellees the assertion that only the Alaska Industrial Board can provide procedural remedies under the act. (Appellant's Brief 22.) This is incorrect and is not the position of the appellees. The appellees contend that the Alaska Industrial Board provides no procedural remedies but rather that the Alaska Workmen's Compensation Act does provide certain remedies which are exclusive and which must be followed by the employee under the scheme of the Act and that though some of these remedies are outside of the purview of the normal activity of the Industrial Board, they nevertheless are remedies provided for by the Workmen's Compensation Act and as part of the exclusive remedy as contemplated by Section 43-3-10 ACLA 1949, cited above. Appellant contends that the portion of Section 43-3-5 ACLA 1949, cited above,

concerning attachment is determinative of the issue here presented. (Appellant's Brief 20.) Appellant throughout his argument looks to this provision as the source of the remedy he attempts to assert through his action as commenced. He contends that the reference therein made refers only to compensation as provided for by the Act and does not relate to the attachment proceedings as set forth in Section 43-3-26 ACLA 1949, which provides for an attachment in an action brought for compensation by way of damages where the plaintiff or someone in his behalf filed an affidavit showing that the employee is entitled to recover compensation from the defendant under the provisions of the act, but that the defendant employer has failed to comply with the act. It appears that the damage action as contemplated and provided for by the Act and the provisional remedy provided by Section 43-3-26 ACLA 1949, allowing attachment in the damage action is based upon compensation. Appellees contend that the provisions of Section 43-3-6, cited above, where it provides in a negative fashion that the preceding provisions shall not prevent an attachment as security for compensation as in this act provided refer to Section 43-3-26 wherein attachment is provided under special circumstances where compensation is due and where the employer has failed to insure or qualify as a self-insurer under the Act. It provides not the ordinary attachment but relieves the attaching plaintiff from complying with certain provisions requiring an undertaking and justification of surety. The damage action

as provided is, appellees submit, in the nature of compensation with the added penalty that the common law defenses available in the normal personal injury action are not available to the defendant employer as a result of his having failed to insure. The obvious purpose of such provision is to make the consequences so drastic that employers will make it their business to comply with the provisions of the act requiring insurance or self-insurance. Appellees contend that the provisions contained in Section 43-3-5 ACLA 1949, in the last paragraph thereof reading:

“* * * Nothing in this section contained shall be deemed to prevent an attachment of property as security for the payment of compensation as in this Act provided.”

clearly manifests an intention by the Legislature that the section of which the above quoted language is a portion is not to be construed so as to limit attachment provisions provided elsewhere in the act. In other words, the Legislature did not intend the lien provision to interfere with the attachment provision as provided in the Act inasmuch as the lien as provided by the statute might be inadequate to secure an employee where an employer had failed to qualify as a self-insurer or had failed to provide the necessary Workmen's Compensation Insurance. It is clear from a reading of that portion of Section 43-3-5, as set forth above, that the Legislature did not intend thereby to create a remedy outside the act in contravention of its declaration that the remedies herein

provided are exclusive but simply added the negative provision as a method of clarifying its intention not to nullify the provisions of a subsequent section concerning attachment under special circumstances.

Appellant contends that the Act is remedial legislation and accordingly should be liberally construed. With this statement, the appellees have no argument. However, this does not call upon the Court to construe the Act so as to provide additional remedies which are not expressly provided, in the face of Section 43-3-10 ACLA 1949, which make the remedies provided in the Act exclusive. That section expressly and unequivocally provides that no rights or remedies except those provided for by the Act shall accrue to the employee. All remedies as provided for in the Act are provided in explicit positive terms. Certainly there is nothing in the Act and nothing in Section 43-3-5 ACLA 1949 that provides a remedy of the type sought by the appellant. The Courts will not substitute its pronouncement for that of the Legislature as each have a separate and individual function to perform.

Appellant's citation of case authority is not of assistance to the question before the Court. The case law cited by appellant stands for broad generalization, and not one case is cited in point on the issue of whether appellant is entitled to sue and attach outside the Act. In fact, appellee's search has failed to show a case where it has even been attempted.

Accordingly, appellees submit that the action as brought by the appellant was not authorized or pro-

vided by the Alaska Workmen's Compensation Act and the District Court did not err in dismissing the appellant's amended complaint, with prejudice, in that it did not have jurisdiction to hear or interfere with the matters of the type brought before it by appellant's initial complaint or on the amended complaint.

Appellant next contends that the District Court exceeded its authority in awarding attorney fees to the appellees after it had dismissed the appellant's amended complaint, with prejudice. Appellant contends that the Territorial statute authorizing the assessment of attorney fees and the rules of the District Court for the District of Alaska are limited to cases in which the matter is decided on its merits. With regard to Section 55-11-51, which reads:

“The measure and mode of compensation of attorneys shall be left to the agreement, expressed or implied, of the parties; but there may be allowed to the prevailing party in the judgment certain sums by way of indemnity for his attorney fees in maintaining the action or defense thereto which allowances are termed costs.”

The appellees here prevailed in the defense of this action and appellant submits that whether or not the matter is subsequently heard on its merits or dismissed on motion does not change the contemplation of the statute whatsoever nor is this expressly or inferentially stated in the statute. The statute allows this to the “prevailing party” and this the appellees are and accordingly are entitled to attorney fees and the Court did not abuse its discretion in awarding

an attorney fee to these appellees. Thus in the case of *Reynolds v. Wayde*, 140 Fed. Supp. 713, 16 Alaska 221, the Court at page 226 states as follows:

“The amount of fee to be allowed depends upon the nature and extent of the services rendered. This case did not go to trial but was disposed of upon motion to dismiss upon Rule 12b FRCP but did require considerable time and labor on the part of the Assistant Attorney General in briefing the question for determination by the Court. Under these circumstances, I feel that a fee of \$250.00 is reasonable to be allowed to the defendants in this action.”

Accordingly, appellees submit that under the statute, the District Court did not abuse its discretion neither in granting nor as to the amount of attorney fees. Under Rule 25 as referred to by the appellant of the amended uniform rules of the District Court for the District of Alaska becoming effective October 1, 1957, such rule provides:

(a) Allowance to prevailing party as costs.

Likewise here the words prevailing party are used, the appellee here, and accordingly the Court did not deviate from its rules in any respect.

The appellant thirdly contends that the District Court abused its discretion in dismissing the action below, with prejudice, and without leave to amend (R. 35). The initial complaint of the appellant was dismissed and pursuant to Rule 15a, F.R.C.P. the appellant filed an amended complaint. This he is entitled to do but once under the rule and this he has done. Thereafter, as provided for by the rule in the

event a dismissal of the amended complaint is had, he must obtain leave of the Court before he is entitled as a matter of law to file an amended complaint. The record is absolutely bare with regard to any request, motion or otherwise, on behalf of the appellant to file a second amended complaint.

The appellant makes much of the fact that the appellees here have levied execution upon its judgment to collect the attorney fee awarded which, of course, it was lawfully entitled to do. All that was required of the appellant was to apply to the Court for the fixing of a supersedeas bond and the posting of such. The record is bare of any indication that any application was so made by the appellant, although, according to the rules, the appellant was able to and did post a cost bond in the amount of \$250.00. Appellees submit appellant's assertion is completely without merit.

V.

CONCLUSION.

Appellees submit the Court below committed no error and properly dismissed with prejudice appellant's complaint and awarded attorney fees to the prevailing party.

Dated, Anchorage, Alaska,
June 16, 1958.

Respectfully submitted,

DAVIS, HUGHES & THORSNESS,
By JOHN C. HUGHES,
Attorneys for Appellees.

No. 15,770 ✓

IN THE
United States Court of Appeals
For the Ninth Circuit

LERROY CHARGOIS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

**On Appeal from the District Court for the
District of Alaska, Third Division.**

BRIEF FOR APPELLEE.

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FILED

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PAUL P. O'BRIEN, CLERK

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No. 15,770

IN THE

**United States Court of Appeals
For the Ninth Circuit**

LERoy CHARGOIS,

VS.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

**On Appeal from the District Court for the
District of Alaska, Third Division.**

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

The appellant was tried to a jury in the District Court, Third Judicial Division, District of Alaska, for a violation of Section 2421, Title 18, U.S.C., and Section 2422, Title 18, U.S.C. The jury found the defendant guilty on both counts. The defendant was sentenced on March 4, 1957, by the trial Court to a term of eighteen (18) months imprisonment on each count, serving of which was to run consecutively. Execution of said sentence has been stayed pending outcome of the present appeal. Jurisdiction is conferred on this Court by Sections 1291 and 1294, Title 28, U.S.C.

STATEMENT OF FACTS.**A. Pleadings.**

The Grand Jury for the Third Judicial Division, District of Alaska, brought an indictment against Leroy Chargois, appellant, charging him in Count I with unlawful transportation, by causing a woman to be transported between San Francisco, California, and Anchorage, Alaska, for the purposes of prostitution, and in Count II with unlawful transportation, by causing a woman to be transported between Fairbanks and Anchorage, Alaska, for the purposes of prostitution. The Grand Jury charged a violation of Section 2422, Title 18, U.S.C. in Count I and Section 2421, Title 18, U.S.C. in Count II.

B. The Facts.

The undisputed facts pertaining to Count I are as follows: That during the month of April, 1955, Mabel Henderson, the victim, also known as Mabel Jamerson and several other names, left San Francisco, California, aboard a commercial airplane and arrived at Anchorage, then Territory of Alaska; that Mabel Henderson was a prostitute at this time and engaged in acts of prostitution after her arrival in Anchorage; that Leroy Chargois, appellant, knew Mabel Henderson prior to her departure from San Francisco and had been in Alaska in her company for about a year prior to April, 1955; that at the time the defendant-appellant and the victim met for the first time, the victim was a prostitute; that prior to her departure there had been talk between the defendant-appellant and the victim about their getting married and that

she was coming to Anchorage for the purpose of making money. As to the rest of the pertinent facts, they are in dispute. The government's evidence indicates that the victim and the defendant-appellant had intended, while in San Francisco, that the victim should work as a prostitute after arriving in Anchorage in order to earn money; that the defendant-appellant borrowed money from a third party for her airplane ticket; that the victim did, in fact, work as a prostitute in Anchorage upon her arrival and shared the earnings gained from her trade with the defendant-appellant.

The undisputed facts pertaining to Count II are as follows: That Mabel Henderson, also known as Mabel Jamerson and other names, went to Fairbanks, Alaska, in June, 1954, and there worked as a prostitute. She went to Anchorage in September and returned to Fairbanks accompanied by the defendant-appellant. She resumed her work as a prostitute. The defendant-appellant knew her trade and that she was working at it. About October 5, 1954, the defendant-appellant and Mabel Henderson returned to Anchorage, Alaska, via Alaska Airlines. The defendant-appellant purchased her ticket. One of the matters Mabel Henderson attended to upon her return to Anchorage was to go to a physician for about two weeks' medical care. In Anchorage, after the medical treatment, Mabel Henderson resumed her work as a prostitute. As to the rest of the pertinent facts, they are in dispute. The government's evidence indicates that the defendant-appellant provided Mabel Henderson

with transportation from Fairbanks to Anchorage, Alaska, so she could continue her work as a prostitute in Anchorage. It is also disputed that the defendant-appellant and Mabel Henderson lived together as man and wife in Fairbanks immediately prior to the Anchorage trip. It is disputed too, that the defendant-appellant shared Mabel Henderson's earnings which she made working as a prostitute after her return to Anchorage.

QUESTIONS INVOLVED.

The points of error relied on by the appellant may be grouped under the following headings:

1. Error in the indictment.
 2. Insufficiency of the government's evidence at the close of the government's case on both counts; lack of sufficient evidence to support the verdict of the jury.
 3. Error in the trial Court's instructions as given and error in refusing to give certain instructions requested by the appellant.
-

ARGUMENT.

The government will argue the assignments of error as grouped under the above paragraph. The defendant, in his brief, makes numerous references back to errors previously assigned, but the government will concern itself with one error at a time and will thus differ somewhat in following the assignments of error listed by the defendant.

I.

ERROR IN THE INDICTMENT.

The fact that Count I of the indictment erroneously characterizes a voyage from San Francisco, California, to Anchorage, Alaska, does not render the indictment void. The words "foreign commerce" constitute a legal conclusion at best, and not facts. The facts alleging the voyage are found in the words,

"from San Francisco, California, to Anchorage, Territory of Alaska. . . ."

The indictment specified pointedly the course of the voyage. There is no variance between indictment and proof. The defendant could not have been misled at the trial nor can he be tried again for the same crime because the indictment is specific as to the place the offense occurred. Finally, the words "foreign commerce" can be disregarded as surplusage since enough is left to make a valid and substantial charge of the crime intended to be charged. In *Craig v. United States*, 81 F. 2d 816 (9th Cir. 1936), the Appellate Court was faced with a challenge to the indictment. They stated as follows on page 822:

"Even if an essential averment in an indictment is faulty in form; yet if it may by fair construction be found within the text, it is sufficient."

In the present indictment, there is no difficulty in determining the points of origin and destination. Further, the defendant does not deny the voyage. He admits the victim traveled from San Francisco, California, to Anchorage, Alaska.

At the close of the government's case, there was enough evidence, if believed, to convict the defendant on both counts; the Court correctly overruled the motion to dismiss.

When the defendant took the stand he admitted the two voyages in question; he admitted that he knew she worked as a prostitute, but that he attempted to discourage such activities. The evidence offered by the defendant was not so overwhelming and so convincing that the jury was bound to believe it. They had a right to disregard all the evidence offered in the defendant's behalf so long as they did not do so arbitrarily. They chose to believe Mabel Henderson and to disbelieve Leroy Chargois. That is the province of the jury. As the Court stated in *Bryson v. United States*, 238 F. 2d 657 (9th Cir. 1956), at p. 662, the weight of the evidence including all factors of credibility which do not render testimony incredible as a matter of law, is beyond the scope of appellate review of jury verdicts.

The defendant's brief argues that in addition to lack of evidence, the evidence on the part of the government shows intentions and purposes on the part of the defendant that are consistent with innocence, not guilt. Yet, the law is clear that if any of the dominant purposes present in transporting a woman interstate is for the purpose of prostitution, it is sufficient to bring the matter within the purview of the White Slave Traffic Act. See *Daigle v. United States*, 181 F. 2d 311 (1st Cir. 1950); *Long v. United States*, 160 F. 2d 706 (10th Cir. 1947); *O'Neal v. United States*, 240 F. 2d 700 (10th Cir. 1957).

The government agrees that human beings act from various motives and for various purposes in their movements. Certainly, the defendant may well have had the intent to do innocent acts, as well as evil, when he induced the victim to travel interstate. People seldom make important decisions with but a single purpose in mind. Yet, there is considerable evidence that a dominant purpose of the defendant in transporting Mabel Henderson was to get her to a market good for prostitution. According to the victim, the defendant put up the money for her trip.

In *Lattanzio v. United States*, 243 F. 2d 801 (9th Cir. 1957), the defendant put up the money for the victim's interstate trip. The Court stated that when one advances money to a woman to travel interstate for the purpose of prostitution, that person has caused the woman to be transported in violation of Section 2421, Title 18, U.S.C. Accord: *Ege v. United States*, 242 F. 2d 879 (9th Cir. 1957).

In another White Slave Traffic Act case, *O'Neal v. United States*, supra, one of the victims testified that she intended to work as a waitress at the conclusion of her interstate trip. The Court stated, p. 702:

“It is not necessary to sustain a conviction under the Act that the sole purpose of the transportation be for immoral purposes.”

The Court reiterated the law the Court had stated in *Dunn v. United States*, 190 F. 2d 496, 497 (10th Cir. 1951), to the effect that it is sufficient to sustain a verdict that one of the compelling purposes of the trip be to have the victim engage in prostitution. The

Court went even further in the *O'Neal* case than the *Dunn* case, by adding, p. 702:

“The jury could infer from the evidence that one of the purposes, if not the compelling purpose, of the transportation was prostitution.”

In the instant case, the proof offered by the government shows that prostitution in Alaska was one of the compelling purposes of both trips.

In *Daigle v. United States*, supra, the Court held that even though only one of the purposes of the trip was prostitution, it is enough upon which to base a conviction for violation of the White Slave Traffic Act.

In *Long v. United States*, supra, the Court sets out again the requirement that only one of the purposes of an interstate trip need be for prostitution in order to sustain a conviction. The Court correctly stated that the aim of prostitution must, of course, be one of the dominant, not incidental, purposes.

The defendant maintains that mere adultery or fornication between the defendant and the victim does not come within the purview of the White Slave Traffic Act. Though such may be the case, yet evidence of illicit sexual conduct between defendant and victim just before the trip and just after, may be introduced to show that one of the purposes of the voyage was illicit intercourse. See *Daigle v. United States*, supra, and *Long v. United States*, supra. *Kelly v. United States*, 207 F. 212 (9th Cir. 1924), holds that evidence of acts and conduct of the parties after their arrival

at Anchorage from Seattle, Washington, is competent to show the purpose of the voyage. In *Lindsey v. United States*, 227 F. 2d 113 (5th Cir. 1955), it was held that evidence of the fact that the victim offered herself for prostitution at the end of the journey is admissible to show a reason for the interstate trip. See p. 117 of the opinion.

To sum up, evidence was offered by the government to show that the victim was a prostitute; that she engaged in prostitution in Anchorage and Fairbanks and again in Anchorage; that the defendant and the victim had illicit sexual intercourse immediately prior to both the trips and after they were terminated; all of these acts were offered to contribute to showing the purposes of the trips and to throw light upon the intent of the defendant at the time he helped and persuaded the victim to make both trips.

III.

ERROR IN THE TRIAL COURT'S INSTRUCTIONS AS GIVEN AND ERROR IN REFUSING TO GIVE CERTAIN INSTRUCTIONS REQUESTED BY THE APPELLANT.

The defendant's last claim of error is that the trial Court refused to give several pertinent instructions, and further, gave incorrect instructions. The defendant requested eight instructions but argues only as to his instructions numbers 3 and 8. We will confine our reply to instructions numbers 3 and 8. The defendant complains (p. 26, Brief) that the Court should have instructed the jury to be cautious in considering a

prostitute's testimony. The defendant cites *Hilliard v. United States*, 121 F. 2d 992 (4th Cir. 1941), to support his contention. The *Hilliard* case holds that while a trial Court might do well to give such instructions, it was not error to refuse to do so. In the *Hilliard* case, the trial Court did refuse to so instruct and the Appellate Court did not reverse. This is the situation in the instant case. In *Sandquist v. United States*, 115 F. 2d 510 (10th Cir. 1940), the trial Court did give an instruction similar to the one requested by the defendant. Therefore, the Appellate Court's decision cannot stand as precedent for whether or not failure to give such instruction is error.

The trial Court in the instant case did make reference to the credibility of witnesses in general. He commented on factors that should be taken into consideration by the jury in assessing a witness' reliability.

The defendant's requested instruction number 8 does not correctly state the law. In *Mortensen v. United States*, 322 U.S. 369 (8th Cir. 1944), the Supreme Court said, p. 374:

"An intention that the women or girls shall engage in the conduct outlawed by Section 2 must be found to exist before the conclusion of the interstate journey and must be the dominant motive of such interstate movement."

The defendant's requested instruction number 8 states in the second paragraph as follows:

"The intent and purpose necessary to convict the defendant must have been formed by him at or

prior to the time that the defendant is alleged to have procured the tickets . . .”

The defendant’s requested instruction does not follow the law as set out in the *Mortensen* case.

The trial Court’s instructions in the present case dealing with the intent and purpose of the defendant in persuading, inducing and enticing the victim to make the trip do state the law correctly. The trial Court’s instruction number 4 is a complete and adequate statement of the law applied to this particular fact situation.

The defendant’s claim (p. 31, Brief) that the trial Court’s instructions numbers 5 and 6 are erroneous seems to be inconsistent with his statement on pages 31 and 32 of his brief. The trial Court’s instructions were correct.

There is no legal error prejudicial to the defendant in any of them.

CONCLUSION.

As to the defendant’s claim of error in Count I of the indictment, it was a matter of form which could not and did not mislead or fail to properly inform the defendant of the charge. The indictment was sufficient. Nor was there any material variance.

There was sufficient evidence from which a jury could properly conclude that the defendant violated the White Slave Traffic Act.

Introduction into evidence of the defendant's illicit sexual conduct with the victim immediately before and just after conclusion of the interstate trip was proper. It went to establishing the fact that the victim did engage in illicit sexual conduct and it threw some light upon the defendant's purpose and intent in transporting her. It corroborated the accusation. The defendant failed to request an instruction limiting the purpose of testimony about such illicit sexual conduct. He could have done so. He cannot complain now.

There were no errors in the trial Court's instructions to the jury. They adequately covered the fact situation with a correct statement of the law.

Dated, Anchorage, Alaska,
January 27, 1959.

Respectfully submitted,

WILLIAM T. PLUMMER,
United States Attorney,

GEORGE N. HAYES,
Assistant United States Attorney,

Attorneys for Appellee.

See Vol. 3062

NO. 15871

**UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CLARENCE A. KOLSTAD and ALTA A. KOLSTAD,
Appellants,

—vs.—

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S BRIEF

Appearances:

FOR APPELLANTS:

Messrs. Cedor B. Aronow and Elmo J. Cure,
Attorneys-at-Law,
153 Main Street,
Shelby, Montana.

FOR APPELLEE:

Mr. Krest Cyr, United States Attorney, Box 396,
Butte, Montana.

Mr. Dale F. Galles, Assistant United States Attorney,
Box 1478, Billings, Montana.

Perry W. Morton, Assistant Attorney General;

Roger P. Marquis, Chief, Appellate Section;

Elizabeth Dudley, Attorney, Dept. of Justice, Lands
Division, Washington, D. C.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

001 2 1958

NO. 15871

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

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STATEMENT OF JURISDICTION

The jurisdiction of the United States District Court is based on 28 USCA 1345, Judiciary and Judicial Procedure. The Jurisdiction of the Court of Appeals is based on 28 USCA §1291, Judiciary and Judicial Procedure. A final judgment of the District Court was filed and entered March 8, 1957 (transcript 28-32) and notice of appeal was filed April 19, 1957 (transcript p. 32). An order by the District Court denying Defendant-Appellant's motion to set aside the judgment under Rule 60B of the Federal Rules of Civil Procedure was filed and entered December 6, 1957 (transcript pp. 52-61). Notice of appeal from the said order was filed January 2, 1958 (transcript p. 62).

STATEMENT OF THE CASE

This is an action commenced by the United States to condemn certain lands in connection with the Tiber dam and reservoir in north central Montana. A complaint was filed in District Court where several different parcels were joined in one unit. The land described in Parcel No. 10 (transcript pp. 8-12) is the land with which this appeal is concerned. The complaint described the owners of Parcel No. 10 as C. A. Kolstad, also known as Clarence A. Kolstad, and Alta A. Kolstad, husband and wife, and others, (mainly in connection with oil and gas lease), who were later defaulted (transcript p. 5), Subsequently,

the matter came on for trial, and the defendants opened with the testimony of Clarence A. Kolstad. The court, after hearing the testimony of Mr. Kolstad, as reported on pages 121 and 122 of the transcript, stopped the trial and had a discussion with counsel. The court, without further evidence, and having been advised that the lands were held as partnership lands, ruled that they were not owned by the partnership (transcript pp. 124 and 137). Having made this ruling, it then required counsel for the appellant to furnish him authority that lands held in separate ownership could be tried as a unit, and compensation be given as a unit. Counsel was unable to furnish him such authority, and was then required to proceed with the trial of the case, dividing Parcel No. 10 into three parcels, mainly the ownership of Clarence A. Kolstad, the ownership of Alta A. Kolstad, and the joint ownership of the two. The case then proceeded to judgment, and appellants being dissatisfied with the judgment, appealed to this Honorable Court.

Thereafter, appellants filed the motion to set aside the judgment, under the provisions of Rule 60B, Federal Rules of Civil Procedure (Transcript p. 34). In support of his motion, appellant, Clarence A. Kolstad filed an affidavit (Transcript pp. 35 - 47). Attached to the affidavit were numerous exhibits which are not printed in the transcript, but which have been desig-

nated and forwarded to the Clerk of the Court of Appeals. An order denying the motion to vacate the judgment was filed and entered december 6, 1957. (transcript pp. 52-61) and appellants appealed from this order (transcript p. 62).

SPECIFICATIONS OF ERROR

1. The Court erred in denying Appellants' motion to set aside the judgment.
2. The Court erred in ordering the trial to proceed on the theory of divided ownership of the land.
3. Accident and surprise which ordinary prudence could not have guarded against in the testimony of Joe Meissner.

ARGUMENT

1. The Court Erred in Denying Appellants' Motion to Set Aside the Judgment.

It is the contention of appellants that the lands involved in this litigation were actually held by appellants as tenants in partnership, regardless of in whose name the bare legal title stood, and because of this, appellants should have been allowed to introduce evidence showing the partnership ownership and the value of the entire parcel before the taking and after the taking.

The Court, after hearing some evidence

on how appellants acquired the property, dismissed the jury from the court room for discussion with counsel (transcript pp. 121 and 122) At this time, all that appellant Kolstad had testified to was the manner of acquisition of one parcel. He had not at that time testified as to the status of the title at the time of the taking. Counsel for appellant attempted to advise the court that the property was held by the partnership of appellants (transcript pp. 124-126). The court rejected the offer of proof, and ruled that there were three separate ownerships of the tract (transcript p. 124 and p. 137). The court should have allowed the evidence of the partnership ownership to the land to be given.

In then proceeding with the trial, counsel for appelants was merely acknowledging the ruling of the Court, that the three parcels were separately owned.

At the discussion, it is important to note that counsel for appellants was making two contentions: 1, that there was one ownership of the entire tract; and 2, that even though there were separate ownerships, that they could be tried together and one award made. When the trial court (tr. p. 144) gave appellant one week to brief the question, it was the second proposition advanced that was to be briefed (tr. p. 56).

The Court arbitrarily, at the trial, ruled the land was separately owned, and then asked for authority that though separately own-

ed, they could be tried as a unit. The very same error was repeated in the trial Court's ruling on the motion to vacate the judgment (transcript p. 56, 57).

In support of their motion under Rule 60 (B), Federal Rules of Civil Procedure, appellants filed a comprehensive affidavit with numerous exhibits. Rule 43 (e), F. R. C. P., provides:

"Evidence on Motions. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partially on oral testimony or depositions"

See also Jones vs. Jones 217F. 2d 239.

At the hearing on the motion under Rule 60 (b), no evidence was before the court except that contained in the transcript of the trial, and in the affidavit of appellant Clarence A. Kolstad. The evidence contained in the affidavit was uncontradicted, and clearly showed that the fact of partnership ownership was of long standing, and **not a recent contrivance.**

Where part of a parcel of land is taken by eminent domain, and severance damages are claimed as to the remainder, it must be shown: 1, that the land is unified in owner-

ship; 2, that the land is physically contiguous; and 3, that the land is unified in use. It is conceded that all of the lands in the three tracts are physically contiguous and unified in use. The only question remaining, then, is whether the land is unified in ownership.

This question arose directly in *City of Stockton vs. Ellingwood*, 275 P. 228, p. 243. "In action No. 3176, as that number appeared in the case below, being for the condemnation of 310 acres belonging to Louis Vogelgesang, appellant contends that the court erred in relation to severance damages. The complaint mentions only 480 acres of land standing in the names of the two parties just mentioned, out of which it is proposed to take 310 acres. The two Vogelgesangs, by their answer, set forth that the 480 acres, out of which it is sought to take 310 acres, was really a part of a larger parcel containing 1820 acres. It appears from the map set forth in appellant's brief that the 1820 acres, irrespective of the question of ownership, lies in one continuous parcel. The contention is made by appellant that as different governmental subdivisions of said tract appear of record in the names of the different defendants, some of the tracts in the name of Gutsav Vogelgesang, and other governmental subdivisions appearing in the name of Louis Vogelgesang, there is not a unity of ownership.

"The defendants, by their answer, to which we have referred, allege that the land is in

fact owned by them as partners, and the testimony set forth in the record warranted the court in finding that while the different governmental subdivisions of the tract stood of record in the names of the different defendants, it was in fact owned by the partnership. The testimony shows that the two defendants were using the tract, as described in their answer, as one parcel. * * * "

" * * * In the case of Perelli-Minetti et al. v. Lawson et al., 272 P. 573, the Supreme Court of this state adopted as its opinion the opinion of this court prepared by Presiding Justice Finch, setting forth the rule of law as to when real estate may be held to be partnership property, though standing in the names of different partners, which is applicable here. The ownership of the property is in fact what is involved. The record shows further that the real estate used as one parcel and standing in the names of the different partners was purchased with partnership funds, * * * The partnership, in fact, was shown to be the owner and in the use and occupation of the 1820 acres. That the tract was used as one parcel appears not to be disputed. * * * "

"* * * Unity of use is simply not alone sufficient. There must be contiguity; that is, the governmental subdivisions must in fact constitute one parcel, and not divided by either natural or artificial objects or ways so

as to divide the land into two or more separate parcels. The question of ownership also enters into the consideration. The partnership being the owner, the different governmental subdivisions all being contiguous, and there being unity in use, we conclude that the trial court did not err in considering the whole tract as one parcel, * * *

The Montana cases follow the California cases, in that they hold that in determining whether land standing in the names of partners as individuals is partnership property is determined by understanding and intention. In *Rockefeller vs. Dellinger*, 56 P. 822, 22 Mont 418, the Court said:

"The intention of the parties at the time the conveyance was made is the proper criterion by which to determine whether the real estate granted to them then became a portion of the partnership assets. To evince presumptively the intention to take and hold land as partnership property, which has been conveyed to the several co-partners, nothing need be shown, except that the land was purchased with partnership assets or funds; and, in the absence of all circumstances tending to prove the intention to have been otherwise, that presumption will usually control and be conclusive."

In *Rinio v. Kester*, 41 P. 2d, 406; 99 Mont. 1, the Court said:

"Plaintiff adduced testimony tending to show that all of the property in question was used by the copartnership in carrying on the partnership business; that it was treated by the partners as partnership property; that taxes, repairs, insurance, etc., were paid out of partnership funds; that from the partnership income tax returns the partnership had deducted, as a portion of its expense, taxes paid on the property in question. * * * Indeed, it appears that there is sufficient evidence upon which the court could base its findings that the property was in truth and in fact owned by the partnership."

Sec. 63-108, R.C.M., 1947, provides:

"(1) All property originally brought into the partnership stock or subsequently acquired by purchase or otherwise on account of the partnership, is partnership property.

(2) Unless the contrary intention appears, property acquired with partnership funds is partnership property. * * *

Sec. 63-402, R. C. M., 1947, Provides.

"(1) A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership. * * *

40 Am. Jur., Partnership, Par. 97, states:

"GENERALLY.—The question of firm ownership of real property has made a most fruitful source of litigation, with a wide variety of opinions making the matter difficult of solution. Under the rule which has the support of the best authority, and which rests on sound principle, the intention of the partners at the time the property was acquired, as shown by the facts and circumstances surrounding the transaction of purchase, considered with the conduct of the parties toward the property after the purchase must govern. * * * "

§103—TITLE IN NAME OF SINGLE PARTNER—Real estate acquired by partners, in a partnership business and for its purposes, constitutes partnership assets, although the legal title is taken in the name of one of the partners. In other words, real estate is not necessarily the individual property of the member of a firm because the title is held by such members in his individual name. Whether such property is, as between the partners, to be treated as partnership property must be determined by ascertaining from their conduct and course of dealing their understanding and intention."

The uncontradicted evidence in the affidavit of Clarence A. Kolstad (Transcript p. 36-40), shows: (1), that it was the intention of the parties that the lands be held as partnership property; (2,) that the lands were operated as a partnership; (3), that the parties made a partnership income tax return; (4), that depreciation on improvements on the land was taken on the partnership return; (5), that the proceeds of the crops grown on the lands were deposited in the partnership account; (6), that taxes and insurance on lands and improvements were paid with partnership funds; (7), that no rent was paid for the use of the lands by the partnership to an individual partner; (8), that the ranches were purchased with partnership funds.

In 53 Am. Jur., Trial, §218, p. 196, it is stated:

"INTENTION, GENERALLY – The question of the intent or motive of a person, when material, is ordinarily one of fact to be determined by the jury from the evidence adduced upon that issue. * * * "

and in §244, p. 210, it is stated:

"PROPERTY RIGHTS; OWNERSHIP, TITLE AND POSSESSION – The ownership of property when an issue in a case is a mixed question of law and fact. If the facts are not in

dispute and if different inferences cannot reasonably be drawn from the undisputed facts, ownership is a question for the court; but where the evidence is conflicting or the facts are in dispute, or are not conclusive, the determination of ownership should be left to the jury under proper instructions from the court, assuming there is substantial evidence which would support a finding in favor of either party. * * * "

In any event, evidence should have been received concerning the partnership ownership, and it was error for the Court to exclude it.

(2) The Court Erred in Ordering the Trial to Proceed on the Theory of Divided Ownership of the Land.

It seems to be conceded (transcript p. 125, 126) that the larger the unit the more economical the operation, and consequently the greater the market value, and where there is a taking under eminent domain or condemnation, the greater the severance damage.

As stated before, it seems conceded that greater severance damage would have resulted had evidence of value been allowed to be introduced on the whole tract before and after the taking. It should be noted that respondent made no objection to the introduction

of value as to the whole tract (transcript p. 122).

Counsel for appellants indicated to the Court, outside the presence of the jury, that there was a partnership ownership, and without hearing any evidence, the Court (transcript p. 137) ruled that there were separate ownerships.

As is stated in 3 Am. Jur., Appeal and Error, §1032, p. 589:

"EXAMPLES OF PREJUDICIAL ERROR — * * * The general principal has been laid down that where the facts of the case are such that the appellate court cannot say that if evidence erroneously excluded had been admitted, the jury would have returned the same verdict, the exclusion of such evidence will be held to be reversible error. If the erroneous exclusion injuriously affects a substantial right, then there is reversible error. It is generally held to affect a substantial right if it relates to a material point. * * * "

Appellants were foreclosed from introducing evidence or law as to the one ownership (transcript p. 142, 144). The Court did give appellants the right to submit a brief on the question of whether one value could be put on separate ownerships (transcript p. 144)

and this was so understood by respondents (transcript p. 148). The evidence of partnership ownership was material, and it was reversible error to exclude it.

In the interests of brevity, appellant desires to incorporate under this specification of error the argument, facts and law set forth under the first specification of error.

(3) Accident and Surprise Which Ordinary Prudence Could Not Have Guarded Against, in the Testimony of Joe Miessner.

The government put on the witness Joe Meissner, and qualified him on page 465 of the transcript, et seq., that he and his brothers farmed the Kolstad lands for six years and he talked of all of the lands of the appellants as one unit and testified as to the production therefrom and his testimony was grossly incorrect to the extent of some twenty-one thousand dollars of income for two years. It appears by the affidavit of Mr. Kolstad (transcript p. 44) it was impossible to examine and prepare the total wheat sales at the time of the trial. Joe Meissner did not have them at the trial. The government put on witnesses such as George H. Gau, P. R. Mac-Male, Thomas Virden and Henry Murray, who testified as to the value of the appellants' lands. Certainly, the production and the income derived from said lands had a great deal of bearing on the value and if such witnesses made inquiry and obtained information as to

the income produced by said lands from Joe Meissner and Mr. Virden of the Bureau of Reclamation who helped Joe Meissner prepare the figures, such witnesses received erroneous information and all of their calculations were erroneous. Joe Meissner was presented by the respondent condemnor as a man who lived and farmed and operated the lands involved herein, in a single unit, for some six years and knew what the production and income was. Either from lack of due care, improper investigation, or some other cause, the Bureau of Reclamation presented to the jury erroneous information which the appellants could not know and could not suspect that Joe Meissner would deliberately or through carelessness give incorrect testimony as to the amount of grain he raised and marketed from the one unit ranch of the appellants which the Meissner Brothers leased.

Likewise, the testimony of Joe Meissner as to the acquisition of the Brinkman lands was erroneous in two respects. It was erroneous as to the date when the deal was made, as the John Brinkman affidavit indicates that no deal was made until the money was paid and the deeds delivered. which was after the date of the order of condemnation, and the second erroneous information given by Joe Meissner in this respect was that the acquisition of the Brinkman land was an arm's length transaction and established market price on a comparable sale. There was no way that the

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**In the United States Court of Appeals
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APPELLANTS,**

v.

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**UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA**

BRIEF FOR THE UNITED STATES, APPELLEE

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FILED

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PAUL P. O'BRIEN, CLERK

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UNITED STATES OF AMERICA, APPELLEE

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MONTANA*

BRIEF FOR THE UNITED STATES, APPELLEE

OPINION BELOW

The district court did not write an opinion. Its views are set forth in its order denying motion to set aside the judgment (R. 52-61).

JURISDICTION

This is an appeal from the deficiency judgment entered January 28, 1957 (R. 24-27), and the final judgment entered March 8, 1957 (R. 28-32), and the order denying the motion to set aside judgment entered December 6, 1957 (R. 52-61). Notices of appeal were filed April 18, 1957 (R. 32), April 22, 1957 (R. 32-33), and January 2, 1958 (R. 62). The jurisdiction

of the district court was invoked by the United States under various Acts of Congress authorizing this condemnation proceeding, specified in the complaint (R. 3-4), including the Act of August 1, 1888, 25 Stat. 357, 40 U.S.C. 257, and the Act of June 17, 1902, 32 Stat. 388, 43 U.S.C. 371; also Sec. 2 of Reorganization Plan No. 3 of 1950, 15 F.R. 3174, and Sec. 28 of Order No. 2509, as amended 17 F. R. 6794. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1291.

QUESTIONS PRESENTED

1. Whether, in a condemnation proceeding in which a number of parcels of land are severally-owned, the value of each parcel should be assessed separately, when they are farmed as a unit.

2. Whether a trial court's ruling on a motion to set aside a judgment is reviewable when no abuse of discretion is shown.

3. Whether, in ruling on a motion under Rule 60(b), F.R.Civ.P., on the ground of newly discovered evidence, the trial court should set aside a judgment when the evidence could have been produced at the time of the trial.

4. Whether a trial court's ruling that severally-owned parcels should be valued separately should be reversed when the landowners fail to make an offer of proof as to the valuation of the parcels as a unit.

STATEMENT

On May 4, 1955, the United States instituted condemnation proceedings for the acquisition of the fee title to certain lands in Toole and Liberty Counties, Montana, for use in connection with the Tiber Dam and Reservoir, Lower Marias Unit, Missouri River

Basin Project, which is a reclamation project. The proceeding involved land under several ownerships, but only Parcels No. 10, containing about 8,886.79 acres, and No. 11, containing about 320 acres, as described in the complaint and the declaration of taking, are here involved (R. 3-15, 147).

On December 12, 1956, a trial before a jury commenced for the determination of just compensation. Mr. Kolstad testified that the property taken was a part of a 17,400 acre ranch owned and operated by him and his wife, Alta A. Kolstad (R. 104-108). However, when he stated that the ranch was composed of three separate parcels, the title to one being in his name, another in his wife's name, and the third in their joint names, the court raised the question of running into a problem of separate ownerships (R. 121-122). Counsel for the appellants argued that the case should be tried as though there were a unity of ownership, since the property was owned by a husband and wife and operated as one unit, and partnership income tax returns were made. It was the court's opinion that compensation for the portions of the three tracts included in the two parcels described by the Government with severance damages in each instance must be separately determined, but that they could be consolidated for trial. However, the court agreed to continue the trial and withhold its ruling until counsel for appellants could submit a brief supporting his argument (R. 122-144). No brief was filed (R. 48), and on January 17, 1957, the trial was resumed (R. 146).

Mr. Kolstad described the ranch as typical land along the Marias and Missouri Rivers, some of which was

irrigated and some was subirrigated from the river bed. The property was used principally for raising winter wheat and cattle, and was improved by buildings suitable for those purposes (R. 112-117, 156-158). He testified that the production of wheat had been consistent, and over the past seven or eight years he had averaged 22 bushels on the seeded acres, which means that one-half of that amount, or 11 bushels per cultivated acre would be the average, because of summer fallowing. He stated further that because of his long residence in this vicinity he knew the market value of lands, and was familiar with the sales which had taken place (R. 168-170, 175, 244). However, in each instance, his valuation was considerably higher than the valuations of the two expert appraisers presented by him.

In addition to Mr. Kolstad, two real estate appraisers testified as to value on behalf of appellants (R. 300-306, 378-382). The Government presented four witnesses who were experienced appraisers (R. 419-423, 439-441, 475-477, 504-507). These seven witnesses used the same method in arriving at their valuations. They classified the land, i.e., plowed land, tillable land, grazing land, bottom land, etc., and valued the acreage included in each classification in accordance with their opinions as to the market value thereof. All of these witnesses stated that there had been very few sales of land in the vicinity in recent years, but considered a few they believed to be comparable (R. 168, 385, 401, 423-424, 442, 481-489, 508-509). They valued each of the three tracts here involved before the taking, and valued the remaining acreage after the taking, the difference in the two figures representing the dam-

age. The following valuations and verdicts, including severance damages, were given:

Clarence A. Kolstad Tract

Original acreage 5,180.7
 Remaining acreage . . . 1,400.7

Taken 3,780.0 acres (R. 177, 193-194)

<i>Landowner's Witnesses</i>	<i>Government's Witnesses</i>	<i>Verdict</i>
\$339,979.30 (R. 176, 183-194)	\$227,000.00 (R. 518-519)	\$232,730.00 (R. 25)
307,000.00 (R. 392)	198,898.62 (R. 425-427)	
305,200.00 (R. 332-333)	194,433.88 (R. 443-454)	
	155,609.10 (R. 483-484)	

Alta A. Kolstad Tract

Original acreage 4,699.87
 Remaining acreage . . . 2,868.59

Taken 1,831.28 acres (R. 209, 222)

<i>Landowner's Witnesses</i>	<i>Government's Witnesses</i>	<i>Verdict</i>
\$160,497.90 (R. 211-222)	\$ 89,600.00 (R. 522-523)	\$ 96,992.00 (R. 26)
127,000.00 (R. 397)	75,450.31 (R. 427-428)	
125,850.00 (R. 334-335)	73,173.95 (R. 445-447)	
	59,700.98 (R. 485-487)	

Clarence A. and Alta A. Kolstad Tract

Original acreage 7,423.00
 Remaining acreage . . . 3,903.00

Taken 3,520.00 acres (R. 237)

<i>Landowners' Witnesses</i>	<i>Government's Witnesses</i>	<i>Verdict</i>
\$278,717.15 (R. 228-237)	\$179,100.00 (R. 524-528)	\$191,024.00 (R. 25)
186,500.00 (R. 400)	131,489.77 (R. 428-429)	
183,800.00 (R. 338-339)	126,302.75 (R. 447-448)	
	102,597.90 (R. 487-488)	

Joe Meissner, who was a witness presented by the Government, testified that he and his brothers leased the entire Kolstad ranch from 1948 through 1953. He stated the average yield of wheat for each of the years, varying from 13 to 24 bushels per acre, giving an average for the six years of 16½ bushels (R. 455-461). On cross-examination, counsel sought to discredit his testimony by questions as to records from which he obtained the yields for the various years (R. 464-498), but offered no rebuttal. This witness also testified that in 1956 he purchased 3,136 acres of land which is very much the

same type as the Kolstad property, about the same terrain, a little more level and larger blocks. There were 2,700 acres of tillable land at \$40 per acre, and the balance was grazing land at \$10 per acre (R. 461-464).

On January 28, 1957, a deficiency judgement in accordance with the jury verdict was entered (R. 24-27), and on March 8, 1957, a final judgment was entered (R. 28-32). Notices of appeal were filed (R. 32-33).

On November 4, 1947, appellants filed a motion to set aside the judgment, on the ground that "the case was tried on the theory of three separate ownerships when in truth and in fact, the property was owned by these defendants as tenants in partnership; that through surprise, mistake and excusable neglect," they were unable to show this ownership, and on the further ground that they had discovered new evidence (R. 34-35). The motion was supported by the affidavit of C.A. Kolstad (R. 35-47). The Government opposed the motion on the ground that the supporting affidavit of appellant does nothing more than show there was a single operation on the separate parcels, which at all times had been recognized by both parties and the court, and on the further ground that the evidence appellants claimed as "newly discovered" was known to them and could have been produced at the time of the trial (R. 47-52). On December 6, 1957, the motion was denied and the court filed an order fully stating its views and giving authorities for its holdings in accordance with the Government's grounds for opposing the motion (R. 52-61). This appeal followed (R. 62).

ARGUMENT

I

The District Court Correctly Ruled That Where Severally-Owned Tracts of Land Are Condemned in One Proceeding, the Value of Each Tract Should Be Assessed Separately

When the trial of this case commenced, it was the impression of the court that the three parcels of land involved were in one ownership (R. 122-123). However, when the court learned that they were separately owned it correctly held that they could not be valued as one tract, as contended by appellants. In *United States v. Runner*, 174 F. 2d 651 (C.A. 10, 1949), in reversing a judgment on a 200-acre tract of land which had been valued as a unit when it was not jointly owned but was broken into four parcels, owned by different individuals, the court stated (p. 652):

Ownership in the land being several, causes of action for just compensation were of course separate and several, and although the causes of action may have been permissibly consolidated for trial convenience, See Rules 18 and 20, F.R.C.P., 28 U.S.C.A., a joint or collective judgment on the several causes of action would be improper and objectionable. *Kohl et al. v. United States*, 91 U.S. 367, 23 L. Ed. 449; *Olympia Light & Power Co. v. Harris*, 58 Wash. 410, 108 P. 940; *Rudacille v. State Commission on Conservation*, 155 Va. 808, 156 S.E. 829; Lewis on Eminent Domain, 3rd Ed., Sec. 767, p. 1369. It follows as a necessary corollary that in the discharge of its corresponding obligation to pay just compensation, the Government is entitled to have the value of severally owned tracts separately

assessed. The situation is quite different where more than one person owns or claims a joint or undivided interest in condemned land. *Meadows v. United States*, 4 Cir., 144 F. 2d 751; *Carlock v. United States*, 60 App. D.C. 314, 53 F. 2d 926; *United States v. 25,936 Acres of Land*, 3 Cir., 153 F. 2d 277.

In the *Runner* case, the four parcels were not used as a unit, but the same rule applies where separately owned parcels are so used. The district court had ample authority for so holding (R. 57-60). The state cases on which it relied are directly in point. In two of them, *Glendenning v. Stahley*, 173 Ind. 674, 91 N.E. 234 (1909), and *McIntyre v. Board of County Com'rs.*, 168 Kan. 115, 211 P. 2d 59 (1949), separate parcels of land were owned by husbands and wives and farmed as units, as in the present case. In *Duggan v. State*, 214 Iowa 230, 242 N.W. 98 (1932), one tract was owned by a brother and sister jointly, and the other tract was owned by the sister alone, and farmed as a unit. The Supreme Court of Tennessee also followed this rule in *Tillman v. Lewisburg & N. R. Co.*, 133 Tenn. 554, 182 S.W. 597 (1915), where a wife sought damages to a parcel of land owned by her and used in connection with a parcel owned by her and her husband as tenants by the entirety, over which a right-of-way was condemned. The reason for this rule is that "claims for damages in proceedings of this character are personal, and must be asserted in the name of the actual owners affected. One person may not recover damages sustained by another, * * *." *Glendenning v. Stahley, supra*, p. 684.

The theory of compensation in eminent domain cases is that the owner is to be compensated fully for all land

taken from him, including the diminution in value of that remaining owned by him, but full compensation does not include diminution in the value of the remainder caused by the acquisition and use of adjoining lands of others for the same undertaking. *Campbell v. United States*, 266 U.S. 368, 372 (1924); *McIntyre v. Board of County Com'rs.*, 168 Kan. 115, 211 P. 2d 59, 64 (1949); *State v. Superior Court for Spokane County*, 10 Wash. 2d 362, 116 P. 2d 752 (1941); 18 Am. Jur., Eminent Domain, sec. 271, p. 912. It is thus clear that the district court correctly ruled that the three parcels must be valued separately, so that the severance damages could be determined to the individual parcels, and followed the ruling of this Court that "in condemnation of part of a tract owned in fee simple, just compensation is the market value of the tract as a whole, before condemnation, less the market value of the portion which remains after the taking of the part. The rule applies exclusively to condemnation of fee simple title of a tract in one ownership." *United States v. Honolulu Plantation Co.*, 182 F. 2d 172, 175 (1950), cert. den. 340 U.S. 820.

Appellants were given an opportunity to submit a brief to the trial court when the question arose as to the separate ownerships, the court stating that if it was wrong in holding that the parcels should be valued separately it would change its ruling. Counsel then asked the court if it ruled against him, must he not then "preserve rights by making an offer of proof?" The court replied: "That is just exactly right"¹ (R.

¹ This is contrary to Mr. Kolstad's allegation in his affidavit that he was foreclosed from making an offer of proof as to partnership ownership of all of the lands involved (R. 41).

142-143). No brief was submitted, and appellants were given from December 13, 1956, until January 17, 1957, more than a month, within which to show the ownership of the property. When the trial resumed, no offer of proof was made of the ownership by a partnership. At this point appellant's counsel expressed no objection to the court's ruling and proceeded to try the case on the separate tract basis.

Counsel never in the language of Rule 46, F.R.Civ.P., made "known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor." The objection originally made in December was on this record plainly not preserved, since no brief was submitted and no further reference was made to the matter when the trial was resumed. And no offer of proof was made either as to single partnership ownership of all the lands, or as to the difference that might be reached when the property is valued separately or as a whole. The situation here is comparable to that in *Rund v. United States*, 256 F. 2d 460 (C.A. 9, 1958), cert. den. October 13, 1958, where by failing to produce authorities in a similar action, the counsel led the court to believe he was not pursuing the matter. Here, it is perfectly clear that the court had not made a definitive ruling, and at the time of recess when he invited the filing of a brief he said: "* * * and I'll notify you just as quickly as I can what my position is, if there is any change in it" (R. 144). Counsel's failure to file a brief naturally would be understood as indicating that he was unable to find authorities to support his position, and his subsequent conduct tended to confirm that understanding.

But even if appellants had then submitted the state-

ments made by Mr. Kolstad in his affidavit 11 months later as to a joint bank account and the filing of partnership income tax returns (R. 36-45), it is submitted that was not sufficient to prove the existence of a legal partnership.² In passing upon the relationship of parties, one of which claimed it to be a partnership and the other a joint venture, the Supreme Court of Montana in *Ivins v. Hardy*, 120 Mont. 35, 179 P. 2d 745 (1947), did not find that the filing of partnership income tax returns for a number of years constituted the relationship a partnership. In an agreement to purchase a tract of real estate, those two individuals were named as the purchasers and the agreement contained no suggestion that they were purchasing as a partnership. The court stated (p. 749):

Our view is that at least prima facie the relationship of the parties in this case was that of tenants in common at the inception of their dealings and that if that relationship was changed to one of partnership or joint adventure in the real estate, it was because of the agreement made for the operation of the property. That agreement, we hold, was referable to the relation of tenants in common and did

² Sec. 63-107, Revised Codes of Montana 1947, provides:

Rules for determining the existence of a partnership. In determining whether a partnership exists, these rules shall apply:

* * * (2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.

(3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.

not serve to change the relationship so far as the ownership of the real estate was concerned. They still held it as tenants in common. Nor do we think the result is affected by the fact that at least a part of the purchase price of the property was hoped to be paid out of earnings arising from the joint operations.

In the absence of proof that the property was owned by a legal partnership, it is clear that the district court correctly ruled that the three parcels should be separately valued.

II

The District Court's Action on the Motion to Set Aside the Judgment Was Discretionary and No Abuse of Discretion Is Shown

A motion under Rule 60(b), F.R.Civ.P., cannot be a substitute for failure to file a motion for new trial within ten days after the entry of the judgment under Rule 59, but there must be some special grounds as specified in Rule 60(b). Cf. *City and County of Honolulu v. United States*, 224 F. 2d 573 (C.A. 9, 1955). None of the grounds therein specified are available to appellants, as they had ample time to produce the evidence in regard to the ownership of the property, and the newly discovered evidence claimed by them was available to them at the time of the trial.

Appellants' motion to set aside the judgment under Rule 60(b), F.R.Civ.P., is addressed to the discretion of the district court, and its decision will not be disturbed except for abuse of discretion. *Cole v. Fairview Development*, 226 F. 2d 175 (C.A. 9, 1955); *Perrin v. Aluminum Co. of America*, 197 F. 2d 254, 255 (C.A. 9, 1952); *Independence Lead Mines Co. v. Kingsbury*,

175 F. 2d 983, 988 (C.A. 9, 1949), cert. den. 338 U.S. 900. "The discretion is not an arbitrary one to be capriciously exercised, but a sound legal discretion guided by accepted legal principles." *Assman v. Fleming*, 159 F. 2d 332, 336 (C.A. 8, 1947). Here, there is no reason why the court should have granted the motion.

Appellants do not charge the trial court with an abuse of discretion, but ask this court to reverse the judgment and order a new trial, on the ground that through surprise, mistake and excusable neglect they were unable to show ownership as a partnership of the three parcels involved. In ruling upon the motion, the district court was faced with contradictory testimony given by Mr. Kolstad under oath. He was the first witness at the trial in January, and shortly after it commenced the following questions and answers were given on direct examination (R. 121-122):

Q. This entire property that is exhibited here in your Defendants' Exhibit 1 that you have described to us and the manner in which you acquired it, is that operated as a family between yourself and your wife, or in what fashion do you operate?

A. We operated it with the same unit. The boys—we operated it all in one unit, the 3,200 acres that are over east of that, and this acreage here (indicating).

Q. You might explain what the ownership of your wife is, and your own ownership with respect to this 17,000-odd acres shown in Exhibit 1.

A. Well, in the beginning in 1942, when I first bought it, we bought two ranches, as I testified to. My wife bought what was known as the Sailor

ranch, and I bought what was known as the Martin Wasesha ranch, so that she owns that in her right, and I own the other one as we purchased it, and the Turner ranch that we bought later, we bought it in joint tenancy.

Q. Well, substantially, without going into the exact details of it, then, your wife owns approximately half of the land and you own approximately half?

A. That is close enough.

Q. Some of it in joint tenancy and others individually owned by her and individually owned by you?

A. Yes.

Q. And while it is probably not important, but when you say that your wife bought one ranch, that was bought with her own money?

A. Yes, it was.

Q. It was actually her ranch?

A. Yes.

Q. It wasn't just a husband and wife deal where you had it deeded to her in her name?

A. No.

Q. Bought with her own money.

In his affidavit in support of his motion, Mr. Kolstad stated that the three parcels of land had been purchased with partnership funds, and that title to the Sailor Ranch "was taken in the name of Alta A. Kolstad but it was the intention of the parties that this ranch be owned by the partnership. The down payment for the Sailor Ranch and all subsequent payments were made from the joint checking account maintained by C. A. Kolstad and Alta A. Kolstad in the Citizens Bank of

Montana at Havre, Montana" (R. 37-40). This testimony, under oath, being exactly contrary to his former testimony at the trial, had to be resolved by the district court, as both statements could not be true.

In *Casey v. Northern Pac. Ry Co.*, 60 Mont. 56, 198 P. 141 (1921), the Supreme Court of Montana stated (p. 145): "It cannot be unfair to this plaintiff to deal with his case from the standpoint of his own statements. A party testifying in his own behalf has no right to be deliberately self-contradictory, and whenever he is so the courts are justified in judging his case from that version of his testimony which is least favorable to him." The district court was therefore justified in accepting as true Mr. Kolstad's testimony that the parcel in his wife's name was owned "in her right, and I own the other one as we purchased it, and the Turner ranch that we bought later, we bought it in joint tenancy" (R. 121), rather than his later testimony as to all of the parcels being owned as a partnership, the individual and joint tenancy ownerships being least favorable to him. "Generally speaking, there is a presumption that the ownership of real estate is where the muniment of title places it." In *Re Hunter's Estate*, 125 Mont. 315, 324, 236 P. 2d 94 (1951). In any event, if we are to believe Mr. Kolstad's second version rather than his first version, this information was in his knowledge and cannot be considered "newly discovered evidence" within Rule 60(b). No justification can be given for appellants' failure to present this during the recess, or at the beginning of the trial in January.

In their brief, appellants ignore the cases relied upon by the district court (R. 58-60), and rely upon cases which show a clear intention of the parties that the

properties involved were intended to be owned by the partnerships. Clearly, these cases do not support appellants' contentions on the facts of this case.

III

The Trial Court Correctly Refused to Set Aside the Judgment on the Ground of Newly Discovered Evidence Concerning the Testimony of Joe Meissner

As a further ground of their motion, appellants allege that since the entry of the judgment they have discovered new evidence (R. 35). They contend they were surprised by the testimony of the Government's witness Meissner as to the production of the land during the time he leased it (Br. 14-15). In his affidavit in support of the motion, Mr. Kolstad stated that Meissner testified that the yield per acre in 1952 was around 13 bushels and in 1953 it was 22 bushels, whereas his [Mr. Kolstad's] investigation reveals that it was 16 bushels in 1952 and 24 bushels in 1953. He asserts that these errors reduced the income from the lands by a little over \$21,000, and would thus reduce the value of the lands.

Again, Mr. Kolstad has contradicted his own testimony. At the trial of the case, on direct examination the following took place (R. 169):

Q. About what has been your average production per acre of seeded land on your ranch over the last 10 years, let us say?

A. Well, I wouldn't go back quite 10 years because I haven't enough records, but I would say in the last seven or eight years, I have averaged 22 bushels on seeded acres.

Q. Now, you said over the last seven or eight years, and that is based upon—you mentioned the word “records,” is that actually based upon records that you have kept?

A. Yes.

Q. And when you speak of records, what records are you referring to?

A. My farm records that I keep for income tax purposes showing the sales, and, of course, the record of the seeded acres can be gotten out of the allotment office.

Q. Now, this average of 22 bushels per acre, and that is seeded acres——

A. Yes.

Q. Does that take into account lean years when production wasn't so good and fat years?

A. It is an average of the years.

Q. And to be fair about it then, so that the jury will understand it, that 22 bushels per acre average, would mean that one-half of that amount, or 11 bushels per cultivated acre would be the average, is that right?

A. That's right.³

Meissner also testified that the yield in 1948 was 24 bushels, in 1949 and 1950 it was around 14 bushels, and in 1951 it was around 17 bushels. In view of the yield according to his testimony being higher than the average according to Mr. Kolstad, it is obvious that it could not have had any adverse effect on the jury's verdict. Indeed, the variation between 22 and 24 bushels an acre,

³ He had previously testified that they crop the land “every other year, summer fallow one year half of the acres, and have half of the acres into crop” (R. 158).

or 13 and 16 bushels an acre, is so small as to constitute simply quibbling over inconsequential matters.

Appellants' contention with regard to the testimony of Meissner as to his purchase of land from Brinkman (Br. 15-16) is not a proper ground for a motion under Rule 60(b) as newly discovered evidence. Meissner was cross-examined at length following his direct testimony (R. 464-474), but not one question was asked about that sale. Furthermore, Brinkman was in the room during the trial under subpoena from the Government (R. 49), and counsel for appellants had an opportunity to further rebut the testimony of Meissner. Cf. *Plaut v. Munford*, 188 F. 2d 543, 546 (C.A. 2, 1951). No attempt was made by the Government to conceal anything regarding the transaction, and it certainly was not the duty of the Government to "put Mr. Brinkman on the stand to verify Joe Meissner" as alleged by appellants (Br. 16). Such a statement is ridiculous.

It is thus clear that the district court did not abuse its discretion in denying appellants' motion, and this Court has stated that it has "no power to go beyond the question as to whether the district court violated its sound discretion." *Stafford v. Russell*, 220 F. 2d 853, 855 (1955).

IV

There is no Showing of Prejudice to Justify Reversal by This Court

Appellants seek to have this Court reverse the judgment and order a new trial for the valuation of the three parcels as a unit. However, there is no evidence in the record that appellants have been prejudiced because of the separate valuations of the parcels. They made

no offer of proof as to the amounts their witnesses would have testified to as the value of the combined parcels before and after the taking by the Government. This Court has stated repeatedly the general principle that a ruling rejecting testimony is not reversible in the absence of an offer of proof. *Fidelity & Deposit Co. of Maryland v. Lindholm*, 66 F. 2d 56, 60-61 (1933); *Sacramento Suburban Fruit Lands Co. v. Miller*, 36 F. 2d 922 (1929); *Romeo v. United States*, 24 F. 2d 527 (1928). The same rule was announced by the Supreme Court in *Origet v. Hedden*, 155 U.S. 228, 235 (1894); and *Herencia v. Guzman*, 219 U.S. 44, 46 (1910); and has been followed in other circuits: *Sorrels v. Alexander*, 142 F. 2d 769 (App. D.C. 1944); *McVeigh v. McGurren*, 117 F. 2d 672, 679 (C.A. 7, 1940), cert. den. 313 U.S. 573; *Downie v. Powers*, 193 F. 2d 760, 768 (C.A. 10, 1921); *Hoffman v. Palmer*, 129 F. 2d 976 (C.A. 2, 1942), affirmed 318 U.S. 109.

The scope of review in a condemnation case is limited to errors of law, and as shown, *supra*, pp. 7-12, the case was tried on correct principles of law. The awards being within the range of the testimony, *supra*, p. 5, are supported by substantial evidence, and are, therefore, conclusive as to the facts on appeal. *Phillips v. United States*, 148 F. 2d 714, 716 (C.A. 2, 1945); *Seale v. United States*, 243 F. 2d 145 (C.A. 5, 1957); *Love v. United States*, 141 F. 2d 981, 982 (C.A. 8, 1944). An examination of the record plainly shows that the case was well and fairly tried, and there is no reversible error. *Chapman v. United States*, 169 F. 2d 641 (C.A. 10, 1948), cert. den. 335 U.S. 860. The grounds now urged to charge the district court with error are not only afterthoughts, but they are premised on contradic-

tion of facts stated under oath at the trial. A reversal is, we submit, plainly not warranted.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the district court should be affirmed.

Respectfully,

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Assistant Attorney General.
KREST CYR,
United States Attorney,
Billings, Montana.

ROGER P. MARQUIS,
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OCTOBER, 1958.

NO. 15871

FILED

DEC 29 1958

PAUL P. O BRIEN, CLERK

UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLARENCE A. KOLSTAD and ALTA A. KOLSTAD,
Appellants,
—vs—
UNITED STATES OF AMERICA
Appellee.

APPELLANT'S REPLY BRIEF

Appearances

FOR APPELLANTS

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Shelby, Montana.

FOR APPELLEE

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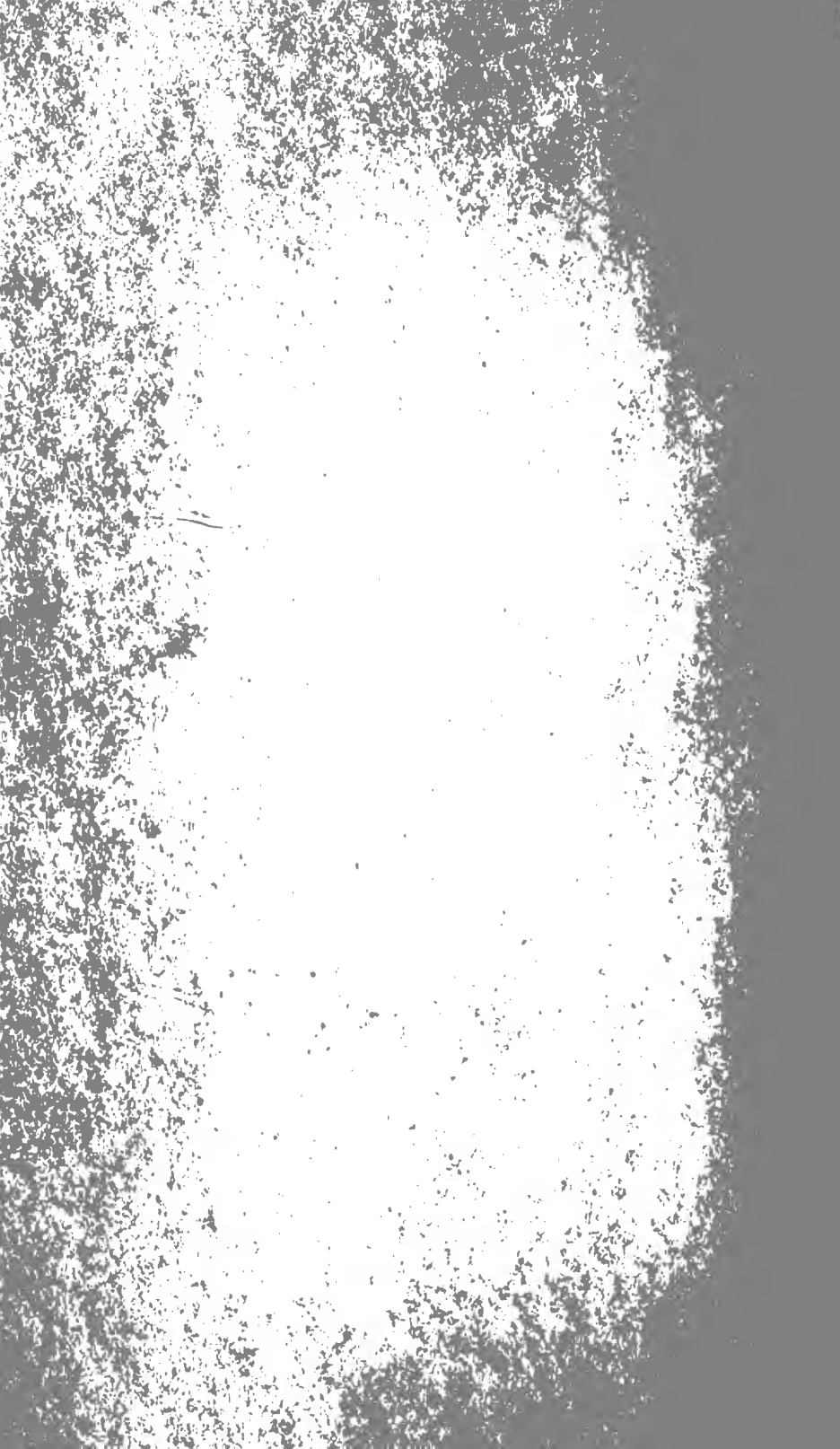
Mr. Dale F. Gales, Assistant United States Attorney,
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Perry W. Morton, Assistant Attorney General;

Roger P. Marquis, Chief, Appellate Section;

Elizabeth Dudley, Attorney, Dept. of Justice, Lands
Division, Washington, D. C.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA



NO. 15871

UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLARENCE A. KOLSTAD and ALTA A. KOLSTAD,
Appellants.

—vs.—

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S REPLY BRIEF

Appearances:

FOR APPELLANTS:

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Roger P. Marquis, Chief, Appellate Section;

Elizabeth Dudley, Attorney, Dept. of Justice, Lands
Division, Washington, D. C.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

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IN A CONDEMNATION PROCEEDING WHERE SEVERAL PARCELS ARE OWNED BY A PARTNERSHIP, JUST COMPENSATION SHOULD BE BASED ON A BEFORE AND AFTER EVALUATION OF THE WHOLE TRACT.

Appellee's argument, p. 7, states this proposition: "The District Court correctly ruled that where severally owned tracts of land are condemned in one proceeding, the value of each tract should be separately assessed."

Here again, as throughout the trial, the hearing on the Motion under Rule 60 (b), and again in its brief, Appellee has **assumed** that the three parcels are separately owned. Appellants have at all times attempted to point out to the Court that the lands were owned by the partnership. This misconception has been the major misunderstanding by Appellee throughout all of these proceedings. The uncontradicted evidence contained in the affidavit attached to Appellants' Motion under Rule 60 (b) shows that the land was owned by the partnership, regardless of in whose name the record title stood.

This is not merely a case where parcels separately owned were farmed as a unit, which is the situation in all of the cases cited by Appellee at pp. 8 and 9 of its brief. The three requirements for one award set forth in *City of Stockton v. Ellingwood*, 275 P. 228, at p. 243, a California case, which has been voluminously quoted in Appellants opening brief, all exist in this case. These requirements are:

- (1) Unity of ownership,
- (2) Land which is physically contiguous.
- (3) And unity in use.

As pointed out in Appellants' brief, the physical contiguity and unity of use are conceded. Appellee, in its brief, proceeds blithely to ignore the evidence on unity of ownership. The Stockton case, *supra*, is on all fours with the situation here, but Appellee has not even seen fit to discuss the case in its brief.

Appellee makes much of the fact that Appellants were given an opportunity by the trial court to submit a brief on their contention, but the transcript clearly shows that Appellants were making two contentions:

1. That there was one ownership of the entire tract;
2. That even though there were separate ownerships, they could be tried together and one award made.

It was upon this second contention that the Court suggested that Appellants could submit a brief. At pp. 56 and 57 of the manuscript, in ruling on Appellants' Motion under Rule 60 (b). Judge Murray said:

"... The Court granted the continuance and also gave counsel for the Defendants a week within which to present the Court some authority to the effect that **even though three**

ownerships were involved, they could be valued as one because they had been operated as a unit. * * * Neither the counsel who tried the case for the Defendants, nor their present counsel have presented the Court any authority holding **that land held in different ownerships, but operated as a unit may be considered as a whole** for the purpose of determining fair market value in a condemnation case, and the Court has been unable to find any such authority."

This demonstrates that the Court at all times assumed several ownerships, and did not suggest that Appellants submit a brief on the unity of ownership. The question as to whether the lands were owned in partnership was one of fact, and the trial court did not, and would not ordinarily ask, to have a brief written on a question of fact. The Appellants were entitled to have the jury pass upon this important question of fact, if there was any contest or dispute concerning it.

Appellee argues in its brief, p. 10, that counsel did not, in the language of Rule 46, F. R. C. P., "make known to the Court the action which he desires the Court to take on his objection to the action of the Court, and

his grounds therefore." In connection with this, it should be pointed out that no objection was ever made to the evidence of Appellants, and no ruling made on the inadmissibility of the evidence, except by implication, and consequently, since Appellants had no opportunity to object to a ruling, the absence of an objection does not prejudice them. See the last sentence of Rule 46, F. R. C. P., and the transcript, pp. 122, 123 and 127.

Appellee, in its brief, p. 11, quoting *Ivins v. Hardy*, 120 Mont. 35, 179 P. 2d. 745, apparently contends for the first time that there was no partnership at all. Even Judge Murray and counsel for Appellee did not deny the existence of the partnership, merely the partnership ownership of the land. The Hardy case, *supra*, dealt only with the question of whether the filing of partnership income tax returns was sufficient to prove the existence of a partnership. Appellants' case is much stronger than that, as Mr. Kolstad's affidavit shows more than eight other indicia of partnership ownership, which were ignored by Appellee in its brief, p. 11. The evidence contained in Appellants' affidavit in support of the Motion under Rule 60 (b), is conclusive and uncontradicted that it was their intention to own the property as tenants in partnership.

THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING APPELLANTS' MOTION TO SET ASIDE THE JUDGMENT UNDER RULING 60 (b), F. R. C. P.

It was conceded at the trial (tr. p. 125), and by Judge Murray in his Order on the Rule 60 (b) hearing (tr. p. 57), that the larger and more economical of operation a farm is, the greater the severance damage, and the higher the value of the land taken. Where Appellants, on the hearing on their Motion under Rule 60 (b), introduced uncontradicted evidence of the unity of the ownership of these three tracts, the Court abused its discretion in refusing to vacate the judgment.

As was said in U. S. v. 12. 381 acres of land, more or less, situated in Curry County, New Mexico, 109 Fed. Sup., 279:

"* * * In an action between the government and one of its citizens, most liberal construction of statutes and rules should be given, in order to prevent unfair and unjust treatment;
* * * "

This case also was a hearing on a Motion under Rule 60 (b), F. R. C. P.

In Re Cremitas' Estate, 14 F. R. D. 15, the Court said:

"Rule 60 (b) further provides for setting aside a judgment for any one of five specified reasons or for '(6) * * * any other reason justifying relief from the operation of the judgment.' In order to take advantage of the reason specifying mistake, inadvertance, surprise or excusable ne-

Cray, 5 Wall. 795, 807, 18 L. ed. 653, 657; Smith v. Shoemaker, 17 Wall. 630, 21 L. ed. 717."

On pp. 13, 14, and 15 of its brief, Appellee argues that Appellant Clarence Kolstad made inconsistent statements concerning the ownership of the land. These statements are readily reconciled, and are entirely consistent with the theory of partnership ownership. It is submitted that Mr. Kolstad was merely citing the layman's idea of a partnership, that is, that each owned half of the property, and further testimony would have explained this, and that each, as a partner, had equal rights and equal ownership in the partnership funds and assets. Likewise, Mr. Kolstad's statements were made for the purpose of negating any idea of a gift by him to his wife. It may further be said that Mr. Kolstad was merely stating how the bare legal title stood when the property was acquired. This question has been amply covered by Appellants in their opening brief, pp. 8, 9 and 10. The affidavit and exhibits filed in the hearing on the Motion under Rule 60 (b) show that the partnership was not an afterthought, as Appellee states, but had existed in fact for many years. The Court was advised that the land was owned by the partnership, but denied Appellants the right to so testify and explain the previous testimony.

THE TRIAL COURT ERRED IN REFUSING TO SET ASIDE THE JUDGMENT ON THE GROUND OF NEWLY DISCOVERED EVIDENCE CONCERNING THE TESTIMONY OF JOE MEISSNER.

It is obvious that the Government, in its brief, pp. 16 and 17, has misconceived the testimony of Mr. Meissner and Mr. Kolstad concerning the average production per acre. The production figures testified to by Mr. Meissner total 104 bushels for the 6 years, giving an average of 17 1-3 bushels per **producing** acre, compared to the testimony of Mr. Kolstad of 22 bushels per **producing** acre. To compare the 11 bushels per cultivated acre testimony of Mr. Kolstad with that of Mr. Meissner, it would be necessary to divide the Meissner average of 17 1-3 acres by two, giving approximately 8 plus bushels per acre compared to Mr. Kolstad's 11 bushels. So it is seen that the testimony substantiates the assertion by Mr. Kolstad that the error in the Meissner testimony reduced the income of the land by over \$21,000.00. The affidavit of Clarence Kolstad as to the wheat production, and the Meissner testimony, is correct, as all of the Kolstad acreage was controlled through the ASC office at Chester, in Liberty County, regardless of the fact that a small portion of the land was located in the neighboring county of Toole. The Kolstad wheat marketing card was issued by the Liberty County office, and all of his allowable wheat acreage planting was controlled by the Liberty County office.

CONCLUSION

In view of the Montana cases of Rockefeller v. Dellinger, 56 Pac. 822, 22 Mont. 418, Rinio v. Kester, 41 P. (2d) 405, 99 Mont. 1, and the evidence contained in Appellants' affidavit in support of their motion under Rule 60B FRCP and the lack of contradictory evidence or authority from the Appellee, it seems clear that the Court cannot do otherwise than to find that a partnership ownership existed since it has been conceded that the larger the tract the larger the damages. Defendant has been greatly prejudiced and it was error for the trial Court to deny appellants' motion under Rule 60B. This action by the trial Court also constituted an abuse of discretion.

It is again re-iterated that the trial Court at all times misconceived the true question.

Respectfully Submitted,

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No. 15771

In the
United States Court of Appeals
For the Ninth Circuit

CARL BEISTLINE,

Appellant,

vs.

CITY OF SAN DIEGO and GENERAL
DYNAMICS CORPORATION,

Appellees.

Appellant's Reply Brief

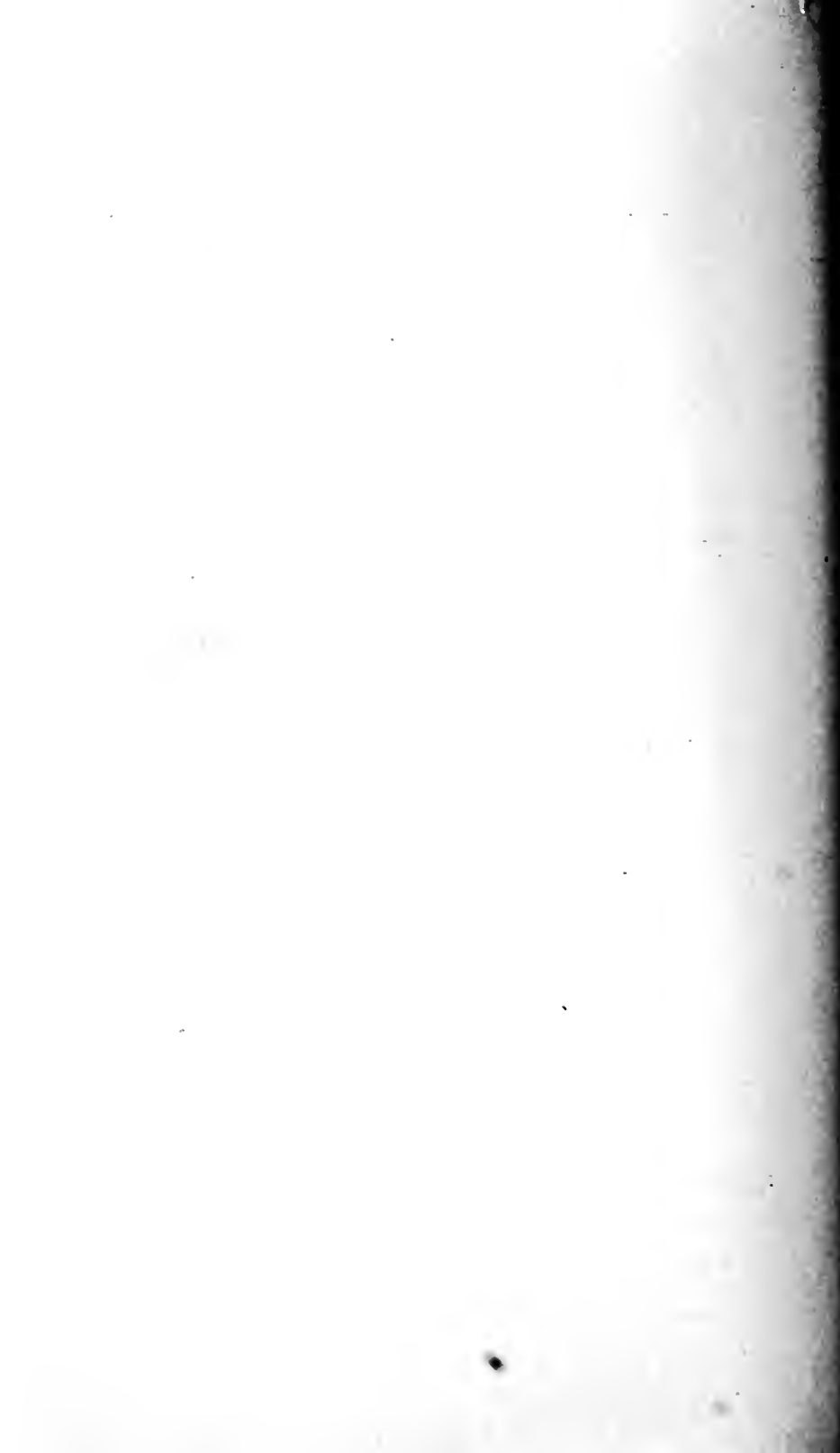
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Appellant's Reply Brief

I.

INTRODUCTION

It seems that appellees in their brief have overlooked or deliberately ignored the purpose and function of Section I of the 14th Amendment to the Constitution of the United States. The provisions of that Section can be invoked only against states or their agencies and then only in instances where it is alleged that they have infringed, or are attempting to infringe, in some manner unlawfully upon the rights or property of citizens of the various states. Whenever said Section is invoked it is the crux of plaintiff's case and

never merely "an incidental involvement" of a federal law or statute. It is also true that whenever that Section is invoked it may be invoked in the federal courts, although it is equally true that it may be invoked in the courts of any of the states. The plaintiff has the option to decide which forum he shall use.

II.

ANALYSIS OF APPELLEES' POINTS

1. APPELLEES' POINT II.

Appellant has no quarrel with the proposition stated in appellees' Point II. Appellant believes, however, that he has sufficiently pointed out in his opening brief the adequacy of the pleadings to invoke the provisions of Section 1 of the 14th Amendment to the Constitution of the United States.

2. APPELLEES' POINT III.

The proposition stated under this point is not true, but even if it were true, it is entirely irrelevant. It is not and never has been the law that merely because the same facts might give rise to an action at common law based upon tort that a litigant cannot elect to rely upon a violation of a constitutional right as the basis for his action and sue in the federal courts. A similar contention was made in the case of *Home Telephone & Telegraph Company v. City of Los Angeles*, 227 U.S. 278, 33 Sup. Ct. 312, 57 L.Ed. 510. In that case the

defendant objected to the jurisdiction of the federal court on the ground that the plaintiff had a cause of action under the Constitution of the State of California and that therefore there was no need to invoke federal jurisdiction. The Supreme Court, however, disposed of this contention and held that even though it might be true that the plaintiff had a remedy under state law this did not militate against the invocation of federal jurisdiction where the complaint alleged actions by state officials which were also proscribed by the Federal Constitution. To the same effect are the cases of *Cuyahoga River Power Company v. City of Akron*, 240 U.S. 462, 36 Sup. Ct. 402, 60 L.Ed. 743; *Weaver v. Pennsylvania-Ohio Power & Light Co., et al.*, 10 F. 2nd 759; and *Portland Ry. Light & Power Co. v. City of Portland, et al.*, 181 Fed. 632, all cited and commented upon in appellant's opening brief.

Furthermore, it is not clear to the appellant that a state or one of its sub-divisions may be sued in a common law action for fraud or for duress as the appellees seem to indicate. As a matter of fact, the general rule is that a state or a sub-division thereof can be sued only with its consent, and appellant knows of no consent statute which is applicable to the facts of this case. Certainly under proper circumstances a state *may* use force in taking a citizen's property, but if the state oversteps the bounds of its authority as limited by the provisions of the 14th Amendment to the Constitution of the United States (or by the provisions of

cations for injunctive relief. However, the form of relief sought merely applies to the remedy and if the court did not have jurisdiction of the subject matter it would not have jurisdiction to render injunctive relief anymore than it would to give relief for a wrong already committed. In the particular case in which we are involved the appellant had no occasion for injunctive relief because the City of San Diego had not threatened to use appellant's property for an unauthorized use. Indeed, had the City at the time it took appellant's property made it clear that it intended to use said property for private use, the appellant might well have applied for injunctive relief, but the purpose did not become clear until after the property had been taken.

3. APPELLEES' POINT IV.

Appellant does not understand appellees' contention under this point, but it appears to be that since the property was not actually taken by judgment of condemnation the appellant's property was not actually "taken" by the appellee, City of San Diego. Appellant quotes as follows from appellees' brief: "It is equally apparent that any conduct which falls short of constituting an exercise of the power of eminent domain does not violate the constitution but at most will give rise to a civil remedy. Therefore, the question here is whether there was a 'taking' of appellant's property." Appellant believes that he has adequately

disposed of this contention under Point (A) in his opening brief. Appellant will therefore merely re-emphasize the fact that the allegations of his complaint make it clear that the conveyance to the City was not voluntary and amounted to a taking by force.

The cases cited by appellees under this point have no bearing upon the question involved because in none of these cases was the property of the plaintiff actually taken. In other words, it may be readily admitted, as claimed by appellees, that the mere threat to condemn one's property does not constitute a taking, or that proceedings having been commenced and abandoned do not constitute a taking, but appellant submits that a threat which actually accomplishes the taking of the property is an entirely different matter.

4. APPELLEES' POINT V.

The proposition stated under this point is not supported by any authority and appellant believes it to be entirely untrue. The case of *Thiriot vs. Santa Clara Elementary School District*, 275 P. 2d 833, 128 C.A. 2d 548 cited by the appellees under this heading merely involves the legal proposition that a judgment of a court that had jurisdiction of the subject matter, when it becomes final, cannot be set aside unless there is a showing of extrinsic fraud. We are not concerned with the question of the finality of any judgment in this case, but appellant believes that even if we were, this court should not be bound by the decision in the

Thiriot case. As appellees themselves point out, the contention that there was a violation of the due process clause of either the federal or state constitutions was not even raised in that case. We cannot speculate as to why constitutional provisions were not invoked, but can merely say that perhaps had they been, the result might have been different. The effect the appellees seek to give to that case would leave it within the power of a state to take the property of citizens for any purpose it wished by the mere expedient of setting forth in the complaint for condemnation a legitimate purpose, obtaining a judgment, allowing it to become final, and then turning right around and using the property for another and unauthorized purpose. Appellant does not believe that this is or should be the state of the law, but the possibility of such action on the part of a state makes evident the need and purpose of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

III.

CONCLUSION

Appellees in their brief have pointed out nothing which destroys the force or effect of the argument in appellant's opening brief. Appellant believes that he has stated a case in his complaint which shows that the appellees have infringed upon certain rights guaranteed appellant by the Constitution of the United

States and that he has properly invoked the provisions thereof in the United States District Court for the Southern District of California, and he therefore again respectfully submits that this Court should reverse the decision of the District Court and remand this case to the said Court for trial.

DATED: March 20, 1958.

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United States Court of Appeals
FOR THE NINTH CIRCUIT

CARL BEISTLINE,

Appellant,

vs.

**CITY OF SAN DIEGO AND
GENERAL DYNAMICS
CORPORATION,**

Appellees.

**BRIEF OF APPELLEE
GENERAL DYNAMICS CORPORATION**

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No. 15771

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Appellees.

BRIEF OF APPELLEE

GENERAL DYNAMICS CORPORATION

I

INTRODUCTION

A. Statement of the Case.

Plaintiff alleges that in 1947 in the City of San Diego, under the color of authority derived from the

State of California, sought to condemn the property described. A complaint for condemnation was filed, and as a result of negotiations the city acquired the property from the plaintiff. It is alleged that this transfer of property resulted from fraud as the city had falsely represented to the plaintiff landowner that the property was to be used for the purposes of a municipal airport. It is further alleged that the plaintiff transferred the property under compulsion since the city had commenced condemnation proceedings. Plaintiff states that this action by the city amounted to a taking of his property without due process of law in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States, and that when the defendant General Dynamics Corporation acquired the property from the city it had knowledge of the facts and therefore holds the property subject to whatever rights the plaintiff has against the City. Plaintiff has asked for a return of the property or, in the alternative, that he be awarded a judgment for damages.

Both the defendant City of San Diego and defendant General Dynamics Corporation filed motions to dismiss the complaint on the ground, among others, that the Court lacked jurisdiction since no issue under the constitution or laws of the United States was raised. This motion was granted by the Honorable James M. Carter, Judge of the District Court for the Southern District of California. It is from the order granting this motion that Plaintiff has appealed.

B. Basis of Jurisdiction

This appellee agrees with appellant that the order of the United States District Court for the Southern District of California dismissing the complaint and entered on the 15th day of August, 1957, is an appealable order. However, it is the contention of the defendants in this case that the District Court does not have jurisdiction on the basis of the existence of a federal question or on any other basis to hear the case at bar. It is submitted that the allegation of plaintiff's complaint fail to show jurisdiction in the District Court.

II

WELL PLEADED FACTS RAISING AN ISSUE UNDER THE FOURTEENTH AMENDMENT MUST BE ALLEGED IN PLAINTIFF'S COMPLAINT

Although Official Form 2 (b) of the Federal Rules provides for a general allegation of a constitutional issue, facts raising the issue must follow in the pleading. Without this, a federal court is without jurisdiction on this ground, even though a general allegation of constitutionality is made. 2 Moore 2d Ed., 396 and 1630; Louisville and Nashville R. Co. vs. Mottley, 211 U.S. 149, 29 Sup. Ct. 42, 53 L. ed. 126, 127 (1908).

"As can be seen, the formal allegation of jurisdiction is, as it should be, easy to set forth. It is, however, extremely important to remember that the general allegation of jurisdiction contained in Official Form 2 (b) must be borne out by the claim

"well pleaded, which follows." 2 Moore
2d Ed., 1630.

III

ASSUMING A VIOLATION OF THE
CONSTITUTION HAS BEEN ALLEGED
BY APPELLANT'S COMPLAINT
RESOLVING SUCH AN ISSUE IS ENTIRELY
IMMATERIAL TO A CORRECT DECISION
OF THE CASE AT BAR

Allegations of the complaint do not raise a substantial federal question and, therefore, this case is not one which "arises under the constitution, laws or treaties of the United States" as required by law. Title 28 U.S.C. Section 1331. Accordingly, the District Court is without jurisdiction to hear this case.

The theories stated by the appellant are based on the purely common law actions of fraud and duress. It is also stated that the city violated an implied condition that the property be used for a public purpose. Obviously, no authority need be cited for the proposition that proof of a violation of the Fourteenth Amendment is not essential for recovery to these actions. Instead it is clear that the question determinative of recovery under each cause is the effect of the city's actions upon the freedom of choice of plaintiff.

The gravamen of both fraud and duress is that the plaintiff did not actually consent to the transaction in question. In the first instance, it is because of misrepresentation of certain of the material facts and in

the second, because force is the sole cause of plaintiff's entering the transaction.

It is stated first that the plaintiff decided to convey the land to the city because of representations that the land would be used for airport purposes when in fact, the city wanted the property for a private investment, and secondly, that the plaintiff sold the property to the city solely because of the threat of a condemnation suit. It is alleged that in doing the above acts, the city violated the Fourteenth Amendment. This is entirely immaterial. Of what possible importance can it be to recovery under the above mentioned common law theories that the city in committing fraud, duress, or violating a condition, incidentally violated the United States Constitution. Why should the Court be required to decide an issue which is unimportant to granting the relief prayed for?

From the above it is clear even without citation of authority that the question of whether there was a violation of the constitution has nothing to do with the case. Thus, there is no Federal jurisdiction.

The law applicable to this case has been well settled ever since the decision of the U. S. Supreme Court in Gully vs. The First National Bank in Meridian, 299 U.S. 109, 57 Sup. Ct. 96, 81 L. ed. 72 (1936). The excellent discussion by Mr. Justice Cardozo of the principles and authorities involved bears quoting at length.

"How and when a case arises 'under the Constitution or laws of the United States' has

"been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. (Citing cases) The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. (Citing cases) A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto (citing cases), and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. (Citing cases) Indeed, the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense. (Citing cases).

"Looking backward we can see that the early cases were less exacting than the recent ones in respect of some of these conditions. If a federal right was pleaded, the question was not always asked whether it was likely to be disputed. (81 L. ed. 72)

"Viewing the case at hand against this background of established principle, we do not find in it the elements of federal jurisdiction.

"1. The suit is built upon a contract which in point of obligation has its genesis in the law of Mississippi. A covenant for a valuable consideration to pay another's debts is valid and enforceable without reference to federal law. For all that the complaint informs us, the failure to make payment was owing to lack of funds or to a belief that a stranger to the contract had no standing as a suitor or to other objections non-federal in their nature. There is no necessary connection between the enforcement of such a contract according to its terms and the existence of a controversy arising under federal law.

"2. The obligation of the contract being a creation of the state, the question remains whether the plaintiff counts upon a federal right in support of his claim that the contract has been broken. The performance owing by the defendant was payment of the valid debts, and taxes are not valid debts unless lawfully imposed. From this defendant argues that a federal controversy exists, the tax being laid upon a national bank or upon the shareholders therein, and for that reason being void unless permitted by the federal law.

"Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit. The tax here in controversy, if valid as a tax at all, was imposed under the authority of a statute of Mississippi. The federal law did not attempt to impose it or to confer upon the tax collector authority to sue for it. True, the tax, though assessed through the action of the state,

"must be consistent with the federal statute consenting, subject to restrictions, that such assessments may be made. (Citing cases). It must also be consistent with the Constitution of the United States. (Citing cases.) If there were no federal law permitting the taxation of shares in national banks, a suit to recover such a tax would not be one arising under the Constitution of the United States, though the bank would have the aid of the Constitution when it came to its defense. (Citing cases). That there is a federal law permitting such taxation does not change the basis of the suit, which is still the statute of the state, though the federal law is evidence to prove the statute valid.

"The argument for the respondent proceeds on the assumption that because permission at times is preliminary to action the two are to be classed as one. But the assumption will not stand. A suit does not arise under a law renouncing a defense, though the result of the renunciation is an extension of the area of legislative power which will cause the suitor to prevail. Let us suppose an amendment of the Constitution by which the states are left at liberty to levy taxes on the income derived from federal securities, or to lay imposts and duties at their pleasure upon imports and exports. If such an amendment were adopted, a suit to recover taxes or duties imposed by the state law would not be one arising under the Constitution of the United States, though in the absence of the amendment the duty or the tax would fail. We recur to the test announced in Puerto

"Rico vs. Russell & Co. 288 U.S. 476, 77 L. ed. 903, 53 S. Ct. 447, supra: 'The federal nature of the right to be established is decisive -- not the source of the authority to establish it.' Here the right to be established is one created by the state. If that is so, it is unimportant that federal consent is the source of state authority. To reach the underlying law we do not travel back so far. By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby. (Citing cases). With no greater reason can it be said to arise thereunder because permitted thereby.

"Another line of reasoning will lead us to the same conclusion. The Mississippi law provides, in harmony with the act of Congress (citing case), that a tax upon the shares of national banks shall be assessed upon the shareholders, though the bank may be liable to pay it as their agent, charging their account with moneys thus expended. (Citing cases). Petitioner will have to prove that the state law has been obeyed before the question will be reached whether anything in its provisions or in administrative conduct under it is inconsistent with the federal rule. If what was done by the taxing officers in levying the tax in suit did not amount in substance under the law of Mississippi to an assessment of the shareholders, but in substance as well as in form was an assessment of the bank alone, the conclusion will be incapable that there was neither tax nor debt, apart from any barriers that Congress may have built. On the other hand, a finding upon evidence

"that the Mississippi law has been obeyed may compose the controversy altogether, leaving no room for a contention that the federal law has been infringed. The most one can say is that a question of federal law is lurking in the background, just as farther in the background there lurks a question of constitutional law, the question of state power in our federal form of government. A dispute so doubtful and conjectural, so far removed from plain necessity, is unavailing to extinguish the jurisdiction of the states.

"This Court has had occasion to point out how futile is the attempt to define a 'cause of action' without reference to the context. (Citing cases). To define broadly and in the abstract 'a case arising under the Constitution or laws of the United States' has hazards of a kindred of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation. One could carry the search for causes backward, almost without end. (Citing cases). Instead, there has been a selective process which picks the substantial causes out of the web and lays the other ones aside. As in problems of causation, so here in the search for the underlying law. If we follow the ascent far enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between

"controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by." (81 L. ed. 73-75).

In the later case of Skelly Oil Co. vs. Phillips Petroleum Co., 339 U.S. 667, 70 Sup. Ct. 876, 94 L. ed. 1194 (1949), the Supreme Court discussed the early jurisdictional decisions including the Gully case, supra, and then made the following statement:

"These decisions reflect the current of jurisdictional legislation since the Act of March 3, 1875, 18 Stat 470, ch 137, first entrusted to the lower federal courts wide jurisdiction in cases 'arising under this Constitution, the Laws of the United States and Treaties.' US Const Art 3, sec. 2. The change is in accordance with the general policy of these acts, manifest upon their face, and often recognized by this court, to contract the jurisdiction of the Circuit Courts (which became the District Courts) of the United States.' Tennessee vs. Union & Planters' Bank, supra (152 US at 462, 38 L. ed 514, 14 S. Ct. 654). (citing cases). With exceptions not now relevant Congress has narrowed the opportunities for entrance into the federal courts, and this Court has been more careful than in earlier days in enforcing these jurisdictional limitations. See Gully vs. First Nat. Bank, supra (299 US at 113, 81 L. ed. 72, 57 S. Ct. 96).

To be observant of these restrictions is not

"to indulge in formalism or sterile technicality. It would turn into the federal courts a vast current of litigation indubitably arising under State law, in the sense that the right to be vindicated was State-created, if a suit for a declaration of rights could be brought into the federal courts merely because an anticipated defense derived from federal law. Not only would this unduly swell the volume of litigation in the District Courts but it would also embarrass those courts -- and this Court on potential review -- in that matters of local law may often be involved, and the District Courts may either have to decide doubtful questions of State law or hold cases pending disposition of such State issues by State courts. To sanction suits for declaratory relief as within the jurisdiction of the District Courts merely because, as in this case, artful pleading anticipates a defense based on federal law would contravene the whole trend of jurisdictional legislation by Congress, disregard the effective functioning of the federal judicial system and distort the limited procedural purpose of the Declaratory Judgment Act." (94 L. ed. at 1200-1)

The rule in the Gully case supra has been followed in a great number of later cases. One of these is Rosecrans vs. William Lozier Inc., 142 F. 2d 118, (8th Cir., 1944) wherein one Winder, assignor of Rosecrans entered into an oral contract with Lozier to operate a commissary recreation building, trailer camp and other facilities for use of employees at the Sunflower Ordnance. The employees were working to manufacture munitions for use in the national defense

effort and facilities were to be operated on United State property. The operations were subject to approval and control of the contracting officer of the Corps of United States Engineers. Before entering into the contract with Winder, the defendants had a cost plus a fixed fee contract with the United States for the design and construction of the ordnance plant. The defendants were further to provide fire and police protection to the entire area pursuant to an arrangement with the government. The question came before the Court of Appeals on an appeal from a judgment dismissing the action for want of prosecution after denial of a motion to remand. The case turned on whether the court had erred in denying plaintiff's motion to remand because, in fact, the action did not arise under the constitution or laws of the United States. The court, in holding that there was no substantial federal question involved in the case, rendered the following discussion at page 121 regarding the principles affecting jurisdiction of the federal courts:

"It is not always easy to determine when a suit may be said to arise under the Constitution or laws of the United States. Some tests, however, seem to be well recognized. To bring a case within the removal statute, a right or immunity created by the Constitution or laws of the United States must be the essential element of plaintiff's cause of action. Gully vs. First National Bank, supra. It is not sufficient to warrant removal that in the progress of the trial it may be necessary to give a construction to the Constitution or laws of the United States, but the case must substantially involve a dispute or controversy

"as to the effect or construction of the Constitution, laws or treaties of the United States, upon the determination of which the result depends. The controversy must be genuine and present as distinguished from a possible or conjectural one. (142 F. 2d p. 121; emphasis supplied)

"It is the contention of defendants that the United States is immanent throughout this contract, and hence, an action based upon it comes within the purview of the removal statute as one arising under the Constitution or laws of the United States. But no federal law is involved in the making of a contract between two private parties even though the subject matter may be such that the laws of the United States became a part of the contract. That authority to enter into a contract finds its source in some federal law does not necessarily bring a cause of action based upon its breach under federal law. Gully vs. First Natl. Bank, supra; People of Puerto Rico vs. Russell & Co., 288 U.S. 476, 53 S. Ct. 447, 77 L. ed. 903. The federal nature of the right to be established and not the source of the authority to establish it is decisive, and not every question of federal law involved in a suit is proof that a federal law is the basis of the suit, and an action based upon a right which may have its origin in the laws of the United States is not for that reason alone one arising under those laws. The controversy arising under the laws of the United States must be basic in character as distinguished from those that are collateral. They must be disputes that are

"necessary for the determination of the rights of the parties, rather than those that are merely possible, incidental or conjectural.

"It is true that hypothetical cases might be conjured up by one of a creative imagination which would sustain federal jurisdiction in the action between the parties here. For instance, a proper regulation promulgated by an officer of the United States Army having authority might be deemed inapplicable or its interpretation a subject of controversy between the parties. But such an issue would be purely conjectural and to render the cause removable there must be 'a genuine and present controversy, not merely a possible or conjectural one.' Gully vs. First National Bank, supra (299 U.S. 109, 57 S. Ct. 97, 81 L. ed. 70). (142 F. 2d, . 123; emphasis supplied).

Another federal case applying the rule of the Gully case is Teague vs. Brotherhood of Locomotive Firemen and Enginemen, 127 F. 2d 53 (6th Cir., 1942). There a Negro fireman alleged that he was entitled to certain rights as an employee because of his seniority with the Gulf, Mobile, and Northern Railway Company. He stated that these rights had not been accorded to him because of the provisions of a secret agreement entered into between railroad and the union. His complaint to set aside the contract as unlawful had been dismissed on the ground that it did not raise a substantial federal question and, therefore, the court was without jurisdiction. The Court, in affirming the ruling of the lower court, said:

"The present suit concededly is based upon private contracts between the appellant and members of his class on the one hand, and the Railroad on the other. The obligation of the contract being a creation of the state, no Federal right supports the appellant's claim that the contract has been broken, Gully vs. First Nat'l Bank, 299 U.S. 109, 57 S. Ct. 96, 81 L. ed. 70, and insofar as the complaint alleges an invasion of the plaintiff's property right to seniority through a secret, discriminatory and conspiratory agreement between the Railroad and the Brotherhood, it sounds in tort, and is to be adjudicated upon the applicable common law of the state. It does not raise a Federal question. The mere fact that one of the alleged conspirators comes into existence through the operation of a Federal law does not bring into question either the validity or the interpretation of the statute. People of Puerto Rico vs. Russell & Co., 288 U.S. 476, 483, 53 S. Ct. 447, 77 L. ed. 903. There it was said: 'The federal nature of the right to be established is decisive -- not the source of the authority to establish it.' Even were this a suit to enforce a right which takes its origin in the laws of the United States, a Federal question would not necessarily be involved for, as was said earlier, 'A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of

'which the result depends.' Shulthis vs. McDougal, 225 U.S. 561, 569, 32 S.Ct. 704, 706, 56 L.ed. 1205." (127 F. 2d p. 55).

The foregoing cases leave no doubt that a federal question is present for jurisdictional purposes only when its decision is essential for granting or denying the relief prayed for. Jurisdiction is present only when an interpretation of the constitution in one manner would grant relief and in another would deny relief. Apparently the rule in the Gully case had its origin in some of the decisions by Chief Justice Marshall. This is shown by the review of certain earlier cases by the court in Smith vs. Kansas City Title and Trust Company, 255 U.S. 180, 41 Sup. Ct. 243, 65 L.ed. 577 (1920):

"At an early date, considering the grant of constitutional power to confer jurisdiction upon the Federal courts, Chief Justice Marshall said: 'a case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States whenever its correct decision depends upon the construction of either.' Cohen vs. Virginia, 6 Wheat. 264, 379, 5 L.ed. 257, 285; and again, when 'the right or title set up by the party may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction.' Osborn vs. Bank of United States, 9 Wheat. 738, 822, 6 L. ed. 204, 224. These definitions were quoted and approved in Patton vs. Brady, 184 U.S. 608, 611, 46 L. ed. 713, 715,

"22 Sup. Ct. Rep. 493, citing Little York Gold-Washing & Water Co. vs. Keyes, 96 U.S. 199, 201, 24 L. ed 656, 658; Tennessee vs. Davis, 100 U.S. 257, 25 L. ed. 648; White vs. Greenhow, 114 U.S. 307, 29 L. ed. 199, 5 Sup. Ct. Rep. 923, 962; New Orleans, M. & T. R. Co. vs. Mississippi, 102 U.S. 135, 139, 26 L. ed. 96, 97." (65 L. ed. at p. 585).

In spite of these earlier decisions, many of the other opinions prior to the decision in the Gully case, supra, were lax in applying the rule. This was noted by Mr. Justice Cardozo as follows:

"Looking backward we can see that the early cases were less exacting than the recent ones in respect of some of these conditions. If a federal right was pleaded, the question was not always asked whether it was likely to be disputed." (81 L. ed. at p. 72).

This situation was also commented on in the Skelly Oil case, supra:

"With exceptions not now relevant Congress has narrowed the opportunities for entrance into the federal courts, and this Court has been more careful than in earlier days in enforcing these jurisdictional limitations. (94 L. ed. at p. 1200; emphasis supplied).

The cases cited by the appellant in "Point (D)" of his brief were all decided before the Gully decision. Therefore, the rules stated in those cases insofar as

inconsistent with the edict of the Gully and other cases are of course overruled, and cannot be considered as contrary authority. Furthermore, all of the decisions cited by the appellant involved applications for injunctive relief wherein the plaintiff was seeking to prevent a constitutional violation; here it is contended that the violation has already occurred. None of those cases were cited by the court in the Gully case, supra, nor contained in the material from the attorneys' briefs summarized in the reports; therefore it can only be concluded that the Supreme Court did not consider them to state applicable principles. Accordingly, no further comment on these cases is warranted.

IV

APPELLANT'S COMPLAINT FAILS AS A MATTER OF LAW TO ALLEGE A VIOLATION OF THE CONSTITUTION

No possible federal question can be presented for decision by plaintiff's complaint since it fails as a matter of law to allege a violation of the constitution. In the previous section of this brief, it was assumed for the sake of argument that a violation of the constitution had been alleged; but it was there pointed out how under the Gully case, supra, such a question, though alleged, was entirely immaterial to deciding the case. It is equally clear from the hereinafter cited authorities that the alleged conduct by the City of San Diego does not constitute a violation of the Fourteenth Amendment.

It is apparent from reading appellant's brief that his contention as to the existence of a constitutional violation is grounded solely on the theory that there was an unlawful taking pursuant to the power of eminent domain. This statement is contained in appellant's brief.

"In any event the central theme of each Count is that the property of plaintiff was taken not for a public use, but for a private use."

It is equally apparent that any conduct which falls short of constituting an exercise of the power of eminent domain does not violate the constitution but at most will give rise to a civil remedy. Therefore, the question here is whether there was a "taking" of appellant's property.

Under the authorities cited in section I of this brief, this taking or exercise of power must appear in the complaint from well pleaded facts. The appellant merely alleges that negotiations took place between himself and city officials as to the sale of his property, and that a complaint for condemnation was subsequently filed in Superior Court. No other facts are alleged. It is well settled, both in California and elsewhere, that the foregoing acts by city officials do not amount to a taking of property. Eckhoff vs. Forest Preservation District, 36 N. E. 2d 245, 248, 377 Ill. 208 (1941); 23 Tracts of Land vs. U.S., 177 F. 2d 967 969-970 (6th Cir., 1949); Hempstead Warehouse Corp. vs. U. S., 98 F. Supp. 572 (Ct. of Cls., 1951); 35 C. J. S. 930).

In the Eckhoff case, supra, the issue before the Supreme Court of Illinois was whether a question of the construction of certain Constitutional provisions, including the Fourteenth Amendment to the United States Constitution, was before the Court. The question was raised by a motion to strike the pleading. The Court said:

"It seems obvious that the taking or damaging of land by eminent domain is not accomplished by passing resolutions or ordinances, nor by negotiating with the owner for the purchase of it, or serving notices upon him that the land may be required for public purpose. The series of corporate actions by the appellee district, complained of, cannot be said to have had the same effect upon their land as the filing of a condemnation petition. Such could not, in any sense, be held to be the taking of land or damaging of land not taken. The fact that at some future time a municipal corporation, with power of eminent domain, may require the land of a private owner, is one of the conditions on which the owner holds land in this State. Entering into negotiations for the purchase, and filing of a petition to condemn, vests no interest in land. (citing cases). (Emphasis supplied).

In 23 Tracts of Land, supra, the Sixth Circuit Court of Appeals made this statement:

"The claim for compensation to which a landowner is entitled for the taking of his property by governmental authority arises at the time of taking.

"The enactment of legislation which authorizes condemnation of property is not such a taking even though it may cause a change in the value of the property. Such legislation may be repealed or appropriations may fail. The filing of a petition in condemnation without taking possession is not a taking. The condemnor may discontinue or abandon his effort. Changes in value from such events are incidents of ownership rather than a 'taking' in the constitutional sense. Danforth vs. United States, 308 U.S. 271, 283-286; 60 S. Ct. 231, 84 L. ed. 240." (Emphasis supplied).

In the Hempstead Warehouse case, supra, it is admitted by the plaintiff that the threat to condemn one's property does not constitute a taking of the property.

"Plaintiff admits that the threat to condemn one's property does not constitute a taking, as well it must;"

The rule has been stated that even though proceedings are commenced and possession of land is taken, the taking is not complete.

"...even though the condemnor may take possession of the property before the proceedings are finally determined, and thereafter abandon the proceedings and relinquish the possession of the property, there is no denial of due process of law." (Vol. 16A C. J. S. 930).

Under California law where an order of immediate possession is made before trial, a "taking" does not occur until the date of possession by the condemning authority. Metropolitan Water District vs. Adams, 107 P. 2d 618, 16 Cal. 2d 676 (1940); City of San Rafael vs. Wood, 301 P. 2d 421, 144 C.A. 604 (1956); People vs. Peninsula Title Guar. Co., 301 P. 2d 1, 47 Cal. 2d 29 (1956); 17 Cal. Jur. 2d 637, Em. Dom. Section 63. These authorities indicate that a taking does not even occur upon the obtaining an order of immediate possession; instead the state instrumentality must have obtained actual possession. It is only then, according to these California authorities, that the power of eminent domain has been exercised and that therefore the landowner is entitled to compensation.

Certainly the above authorities reflect a fortiori that negotiations together with filing of the complaint in condemnation do not amount to a taking of the property under the power of eminent domain. Without an actual exercise of this power for a private purpose there can be no constitutional violation. This is because all acts falling short of a "taking" will at most give rise to the common pleaded law theories of recovery. It is clear, therefore, that no violation of the Fourteenth Amendment has been alleged.

"pretends to represent a party, and connives at his defeat, or, being regularly employed, corruptly sells out his client's interest." Pico vs. Cohn (1891) 91 Cal. 129, 133-4, (25 P. 970, 27 P. 537, 25 Am. St. Rep. 159, 13 L.R.A. 337).) (128 C. A. 2d at pages 549-50).

The case is also significant since it was not even contended that the conduct of the school district had violated the due process clause of Federal or State Constitutions.

VI

CONCLUSION

From the foregoing argument and citation of authority, it must be concluded that the District Court has no jurisdiction to hear this case. The complaint does not allege facts constituting a violation of the Fourteenth Amendment. Even if it be assumed that such a violation is alleged, decision of such a question is entirely unnecessary to granting the relief prayed for.

No. 15771

In the
United States Court of Appeals
For the Ninth Circuit

CARL BEISTLINE,	} <i>Appellant,</i>
vs.	
CITY OF SAN DIEGO and GENERAL DYNAMICS CORPORATION,	
<i>Appellees.</i>	

Appellant's Opening Brief

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In the
United States Court of Appeals
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CARL BEISTLINE,

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vs.

CITY OF SAN DIEGO and GENERAL
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Appellees.

No. 15771

Appellant's Opening Brief

I.

BASIS OF JURISDICTION

1. Plaintiff by his pleadings alleges that this case raises a controversy involving Section I of the 14th Amendment to the Constitution of the United States, and that the amount in controversy exceeds the sum of \$3,000.00; that is to say, plaintiff claims that his case is based upon a federal question and that the United States District Court has jurisdiction of the matter by virtue of Section 1331 of Title 28 of the United States Code. The United States District Court for the Southern District of California entered its order dismissing the complaint on the 15th day of August, 1957 on the ground that there was no sub-

stantial federal question involved. Since this was a final decision disposing of the action and this is not a matter upon which a direct review may be had in the Supreme Court of the United States, this Court has jurisdiction to review said order on appeal by virtue of Section 1291 of Title 28 of the United States Code. Although the order allowed plaintiff twenty days to amend, plaintiff did not amend but elected to stand on his pleadings and filed this appeal. The order is therefore an appealable order, *Asher v. Rupp*, 173 F. 2d 10.

2. It is plaintiff's contention that the allegations necessary to show the existence of jurisdiction in the United States District Court are to be found in the pleadings at the following places in the record:

Paragraphs I and II of the first cause of action on page 3 of the record;

Paragraph IV of the first cause of action on page 4 of the record;

Paragraphs V, VI and VII of the first cause of action on pages 4 and 5 of the record;

Paragraphs VIII and X of the first cause of action on pages 5 and 6 of the record;

Paragraph XI of the first cause of action on page 7 of the record;

Paragraphs I and II of the second cause of action on pages 7 and 8 of the record;

Paragraph III of the second cause of action on pages 8 and 9 of the record.

II.

STATEMENT OF THE CASE

It is plaintiff's contention that the State of California acting by and through one of its sub-divisions or local agencies, the City of San Diego, and under color of authority derived from the State, to wit, the eminent domain statutes, forced the plaintiff to transfer to the said City certain real property owned by the plaintiff for an alleged public use; that, however, said property has not been put to a public use, but has been employed for a private use. Plaintiff alleges that he did not voluntarily transfer said property and would not have done so had it not been for the compulsion exercised on him by the City of San Diego. (See Paragraph XI of the first cause of action, page 7 of the record, and Paragraph II of the second cause of action, page 8 of the record.) In the meantime, since the City acquired said property from plaintiff it has greatly appreciated in value, as plaintiff expected it to do. Plaintiff further alleges that the City of San Diego never actually intended to use plaintiff's property for a public use, but was in effect speculating in real property. (Paragraph X of the first cause of action, page 6 of the record.) Plaintiff contends that by acquiring plaintiff's property in the manner indicated, the defendant, City of San Diego, took his property without due process of law in violation of Section 1 of the 14th Amendment to the Constitution of the United States, and that when the defendant, General Dynamics Corporation, acquired the said

property from the City it had knowledge of the facts, and therefore it is not an innocent purchaser for value without notice, and holds the property subject to whatever rights plaintiff has against the City of San Diego. Plaintiff prays for a return of the property, or if that is not possible, then for a judgment declaring the City of San Diego to be a trustee of the proceeds of the sale thereof for the benefit of plaintiff, or in the further alternative, a judgment for damages. Plaintiff offers to restore all consideration received by him and to do whatever is equitable in the premises.

III.

SPECIFICATION OF ERRORS

The only error specified upon this appeal by plaintiff is that the Court erred in dismissing the action for lack of jurisdiction in the United States District Court on the ground that the case did not present a substantial federal question.

IV.

ARGUMENT

Summary of Argument

Point (A). *Defendant, City of San Diego, took plaintiff's property.*

Point (B). *The act of the City is the act of the State.*

Point (C). *Plaintiff's complaint is based on the charge that defendant, City of San Diego, took plaintiff's property by means of fraud and duress for private use.*

Point (D). *The taking of private property by a State or an agency thereof for private use violates Section I of the 14th Amendment to the Constitution of the United States.*

POINT (A)

Defendant, City of San Diego, took plaintiff's property. The complaint adequately sets forth plaintiff's charge that the transfer to the City was not voluntary. (See Paragraphs V, VI and VII of the first cause of action on pages 4 and 5 of the record, Paragraph XI of the first cause of action on page 7 of the record, and Paragraphs I and II of the second cause of action on pages 7 and 8 of the record.

Plaintiff would not part with the property prior to the instigation of condemnation proceedings. He even refused to negotiate with the City's representa-

tive concerning a possible sale. So the City commenced condemnation proceedings to compel the plaintiff to either negotiate with it with reference to price, or to allow the price to be fixed in accordance with the provisions of the eminent domain statutes of the State of California. Plaintiff had no recourse as far as the *taking* of the property was concerned. The alleged purpose of the taking, to wit, for use as a municipal airport, was a legitimate public use. (Calif. Code of Civil Procedure, Sec. 1238, Subsec. 20). He could have haggled with reference to price. But the fairness of the price as of the time of the taking is not in issue. Presumably plaintiff felt that he would have gained no substantial advantage by going through the sometimes lengthy process of having the price fixed by a jury, so he agreed to the price offered and conveyed the property to the City, assuming of course that he had no alternative but to convey.

In short, plaintiff contends that for the question with which we are here concerned there is no substantial distinction between the situation presented here and the case where the condemnation proceedings are completed and the value of the property taken is fixed by a jury. In both cases the property has been taken under compulsion of law.

POINT (B)

The act of the City is the act of the State. The City of San Diego is given its municipal powers by a charter issued by the State of California (See Paragraph II of the complaint, page 3 of the record). It is an agency of the State and derives its authority therefrom. The Fourteenth Amendment to the Constitution is directed against the states and their agencies and creatures, *Marten v. Holbrook*, 157 Fed. 716; *West Virginia State Board of Education, et al. v. Barnette, et al.*, 319 U.S. 624, 63 Sup. Ct. 1178, 87 L. Ed. 1628.

Acts done under or by authority of the laws of a state are ascribable to it, *Home Telephone & Telegraph Company v. City of Los Angeles*, 227 U.S. 278, 33 Sup. Ct. 312, 57 L. Ed. 510. The latter case was a suit to enjoin the enforcement of a municipal ordinance averred to be repugnant to the due process of law clause of the Fourteenth Amendment to the Federal Constitution. The assailed ordinance was one fixing telephone rates, and the complaint charged that the rates fixed were so unreasonably low that their enforcement would bring about the confiscation of the property of plaintiff. The defendant entered a plea to the jurisdiction of the Court on the ground that the Constitution of the State of California had a provision to the effect that no person shall be deprived of life, liberty, or property without due process of law and that the plaintiff had never invoked the aid or protection of its own state to prevent the alleged taking of its property so that, therefore, the action complained of was not actually the act of the state.

The District Court agreed with the defendant and dismissed the bill for want of power as a Federal Court to consider it. A direct appeal was taken to the Supreme Court and that Court reversed, holding that the District Court did have jurisdiction and should have entertained the bill. In its opinion the Court said:

“Here again the settled construction of the Amendment is that it presupposes the possibility of an abuse by a state officer or representative of the powers possessed, and deals with such a contingency. It provides, therefore, for a case where one who is in possession of state power uses that power to the doing of the wrongs which the Amendment forbids, even although the consummation of the wrong may not be within the powers possessed, if the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrongdoer. That is to say, the theory of the Amendment is that where an officer or other representative of a state, in the exercise of the authority with which he is clothed, misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the state has authorized the wrong is irrelevant, and the Federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power.”

In further support of this point see the last paragraph of the opinion in the case of *Cuyahoga River Power Company v. City of Akron*, 240 U.S. 462, 36 Sup. Ct. 402, 60 L. Ed. 743, which opinion is set forth in its entirety under “Point D” below.

POINT (C)

Plaintiff's complaint is based on the charge that defendant, City of San Diego, took plaintiff's property by means of fraud and duress for private use. This charge is the essence, the very basis of plaintiff's complaint. In the first Count of the Complaint, plaintiff alleges the taking by means of fraud, which is surely not due process, and in the second count he alleges the taking by means of duress and the violation of a condition, implied if not actual, that the property be used for a public purpose. In any event the central theme of each Count is that the property of plaintiff was taken not for a public use, but for a private use.

This case is entirely unlike the case of *Gully v. The First National Bank in Meridian*, 299 U.S. 109, 57 Sup. Ct. 96, 81 L. Ed. 72, cited by the Court in its memorandum of decision dismissing plaintiff's complaint. It is fundamental that where there is more than one forum available for the trial of an action, the plaintiff has the right to choose the forum. Plaintiff has the right to decide whether he will rely on violation of a Congressional Act, or of a provision of the United States Constitution (*Munoz v. Porto Rico Ry. Light and Power Co.*, 83 F. 2d 262). It has been held in numerous cases that the complaint unaided by any anticipation or avoidance of defenses must show that it actually and substantially involves a controversy respecting the validity, construction, or effect of an Act of Congress (or the Constitution) upon the determination of which the result depends (*South Side*

Theatres v. United West Coast Theatres Corp., 178 F. 2d 648). In the *Gully* case, *supra*, plaintiff, the collector of taxes for the State of Mississippi, sued the defendant Bank in a Mississippi court for taxes due from another bank, which it had agreed to assume when it took over the assets of the other bank. Defendant attempted to raise a federal question *by way of answer* and had the case removed to a federal court on the ground that a federal law was involved, his theory being that because it was only by reason of a Congressional act that the State of Mississippi could tax shares of a National Bank, a federal question was necessarily involved. The Supreme Court held that this was merely a collateral or incidental involvement of a federal law and that such law was not actually the *basis of the action*, and that therefore there was no federal jurisdiction. Judge Cardozo said in effect that the mere fact that a federal question may lurk in the background is not enough to warrant removal. Quoting from Judge Cardozo's opinion,

“That there is a federal law permitting such taxation does not change the basis of the suit, which is still the statute of the state, though the federal law is evidence to prove the statute valid.”

In said opinion the Court also says,

“To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action.”

It is submitted that plaintiff's right not to have his property taken for private use is an essential element of his cause of action. Or, to put it another way, the immunity of plaintiff's property from seizure for private use is an essential element of plaintiff's cause of action.

POINT (D)

The taking of private property by a state, or an agency thereof, for private use violates Section I of the Fourteenth Amendment to the Constitution of the United States. It seems elementary that if the Federal Courts have jurisdiction to enjoin a threatened or attempted action of a state aimed at taking a person's property for private use, they would also have jurisdiction to remedy such action once it has been accomplished. It also seems that there should be no distinction between a case where a state has taken, or is attempting to take, a person's property without just compensation, and a case where a state has taken, or is attempting to take, a person's property for private use.

If the foregoing be granted, and plaintiff believes it must be, there is ample authority for the proposition stated above; that is, that the taking of private property by a state, or an agency thereof, for private use violates Section I of the Fourteenth Amendment to the Constitution of the United States, and for the further proposition that the United States District Courts have jurisdiction to try cases based upon such a charge.

The cases involved in *Mosher v. City of Phoenix*, 287 U.S. 29, 53 Sup. Ct. 67, 77 L. Ed. 148, went up to the Supreme Court by writ of certiorari from the Circuit Court of Appeals for the Ninth Circuit limited to the question of the jurisdiction of the District Court as a federal court. There was no diversity of citizenship, and jurisdiction depended upon the presentation by the bills of complaint of a substantial federal question. Chief Justice Hughes delivered the opinion of the Court, from which plaintiff quotes as follows:

“The suits were brought by petitioner as owner of parcels of land in the City of Phoenix, Arizona, to restrain the City from appropriating her land for purposes of a street improvement. The Circuit Court of Appeals, having decided in *Collins v. Phoenix*, 54 F. 2d 770 (where jurisdiction of the federal court rested on diversity of citizenship) that the proceedings of the City were not authorized by the statutes of Arizona, held in the instant cases that the petitioner, having alleged that the proceedings were void under the state law, had not presented a substantial federal question. But petitioner did not stop with allegations as to the City’s authority under state law. Petitioner also alleged, in No. 6, after setting forth her title, her claim as to the width of the street in question, and the action of the City in including her property as a part of the street and in contracting for the street improvement upon that basis, that the City was thereby attempting to take and appropriate the property of plaintiff without compensation, and to take and appropriate and use same and deprive the said plaintiff of the permanent use

thereof without due process of law, or any process of law and in violation of the rights of plaintiff as guaranteed her under the Constitution of the United States, and particularly under amendments Five and Fourteen thereof, which plaintiff here and now pleads and relies on for her protection against the wrongs and threatened wrongs of the defendant City in the proposed taking of her property as hereinbefore described.”

The Court reversed the decrees saying:

“We are of the opinion that the allegations of the bills of complaint that the City acting under color of state authority was violating the asserted private right secured by the Federal Constitution, presented a substantial federal question, and that it was error of the District Court to refuse jurisdiction.”

The case of *Cuyahoga River Power Company v. City of Akron*, 240 U.S. 462, 36 Sup. Ct. 402, 60 L. Ed. 743 was an appeal from the District Court of the United States for the Northern District of Ohio. The facts are presented in the very brief opinion of the Court delivered by Justice Holmes, which plaintiff quotes *in toto* as follows:

“This is a bill in equity brought by an Ohio corporation against a City of Ohio to prevent the latter from appropriating the waters of the Cuyahoga River and its tributaries above a certain point. It alleges that the plaintiff was incorporated under the laws of Ohio for the purpose of generating hydro-electric power by means of dams

and canals upon the said River, and of disposing of the same; that it has adopted surveys, maps, plans and profiles to that end, has entered upon, located and defined the property rights required, has instituted condemnation proceedings to acquire a part at least of such property, has sold bonds and spent large sums and has gained a paramount right to the water and necessary land. The bill also alleges that the City has passed an ordinance appropriating the water and directing its solicitor to take proceedings in Court for the assessment of the compensation to be paid. The District Court dismissed the bill for want of jurisdiction on the ground that it presented no Federal question, because if the plaintiff had any rights they could be appropriated only by paying for them in pursuance of the verdict of a jury and a judgment of a Court. It made the statutory certificate and the case comes here by direct appeal. 210 Fed. Rep. 524.

“It appears to us that sufficient attention was not paid to other allegations of the bill. After setting out various passages from the statutes and constitution of Ohio and concluding that the City has no constitutional power to take the property and franchises that the plaintiff is alleged to own or any property for a water supply, it alleges that the City does not intend to institute any proceedings against the plaintiff but intends to take its property and rights without compensation; that it is building a dam and has taken steps that will destroy the plaintiff's rights; that it is insolvent; that the purpose of the ordinance and certain statutes referred to is to appropriate and destroy those

rights without compensation; that the defendant purports to be acting under the ordinance, and that in so acting it violates Article I, Sec. 10, and the Fourteenth Amendment of the Constitution of the United States. It is established that such action is to be regarded as the action of the State. *Raymond v. Chicago Union Traction Co.*, 207 U.S. 20. *Home Telephone and Telegraph Co. v. Los Angeles*, 227 U.S. 278. Whether the plaintiff has any rights that the City is bound to respect can be decided only by taking jurisdiction of the case; and the same is true of other questions raised. Therefore it will be necessary for the District Court to deal with the merits, and to that end the decree must be reversed."

The case of *Weaver v. Pennsylvania-Ohio Power & Light Co., et al.*, 10 F. 2d 759, was an appeal to the Circuit Court of Appeals for the Sixth Circuit from a decision by the District Court of the United States for the Eastern Division of the Southern District of Ohio. The complaint sought to enjoin the relocation of a portion of an inter-county highway which involved the taking of a strip across the plaintiff's land. The plaintiff contended that in such relocation the highway commissioners acted, not in the interest of public necessity, but for the benefit of private interests only, and so in abuse of the power of eminent domain, and in violation of the Fifth and Fourteenth Amendments to the Federal Constitution. The District Court rejected appellant's contention and dismissed the complaint. Upon appeal the question of the jurisdiction of the

District Court to entertain the action was raised and the Court said in that connection (page 760):

“As the bill charges collusion between the highway authorities and private interests to use the power of eminent domain in taking plaintiff’s land for private purposes, and without public necessity therefor, the District Court had jurisdiction, on elementary principles, to entertain bill for injunction.”

In the case of *Portland Ry. Light & Power Co. v. City of Portland, et al.*, 181 Fed. 632, the plaintiff was a common carrier owning and operating a street railway system in the City of Portland, Oregon. In its complaint the plaintiff charged that the defendant City was attempting to condemn and appropriate a part of its right of way without any authority to do so. The defendant demurred to the bill on the ground that it appeared therefrom that the common council of the City had jurisdiction of the subject matter and of the parties, and proceeded regularly and in accordance with the provisions of the Charter in the matter of opening and widening certain streets involved and the appropriation of private property therefor, and therefore that complainant’s remedy was by an appeal from the award of the appraisers, or by some direct proceeding to review the action of the common council, and not by an independent suit to enjoin the enforcement of the order for the opening of the street. The Court, however, issued a preliminary injunction and in its opinion said:

“This argument overlooks the pith of this controversy. The complainant’s position is not that the proceedings of the common council are irregular, but that it is an attempt to deprive it of its property without due process of law, in violation of the Fourteenth Amendment to the Federal Constitution, inasmuch as the City has no power under its Charter to take or appropriate its right of way or franchise for street purposes. If the order of the common council under its authority to open streets has deprived, or is about to deprive, the complainant of its property without due process of law, it is entitled to a remedy in this Court under Judiciary Act, March 3, 1887, c. 373, 24 Stat. 552 (U. S. Comp. St. 1901, p. 508), and the federal Constitution.”

Further on in its opinion the Court states as follows:

“The Fourteenth Amendment is a guaranty to every citizen, private or corporate, that he or it shall not be deprived of property by a state or any of its political subdivisions without due process of law, and the federal court has jurisdiction to enforce this guaranty. The taking of private property by a municipality without authority is clearly such a taking.”

CONCLUSION

As a conclusion from the foregoing, plaintiff submits that it is evident that the basic charge of his complaint is that the State of California has wronged plaintiff by taking his property for an unauthorized purpose and a purpose proscribed by the Constitution of the United States under circumstances corresponding with those in which the Courts have quite uniformly held such taking to be a taking without due process of law in violation of Sec. 1 of the Fourteenth Amendment to the Constitution of the United States and that therefore the court below erred in dismissing plaintiff's complaint for lack of jurisdiction.

It is therefore respectfully submitted that this Court should reverse the decision of the District Court and remand this case to said Court for trial.

DATED: January 30, 1958.

RALPH W. SQUIER

for

McNULTY and SQUIER

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625 Broadway

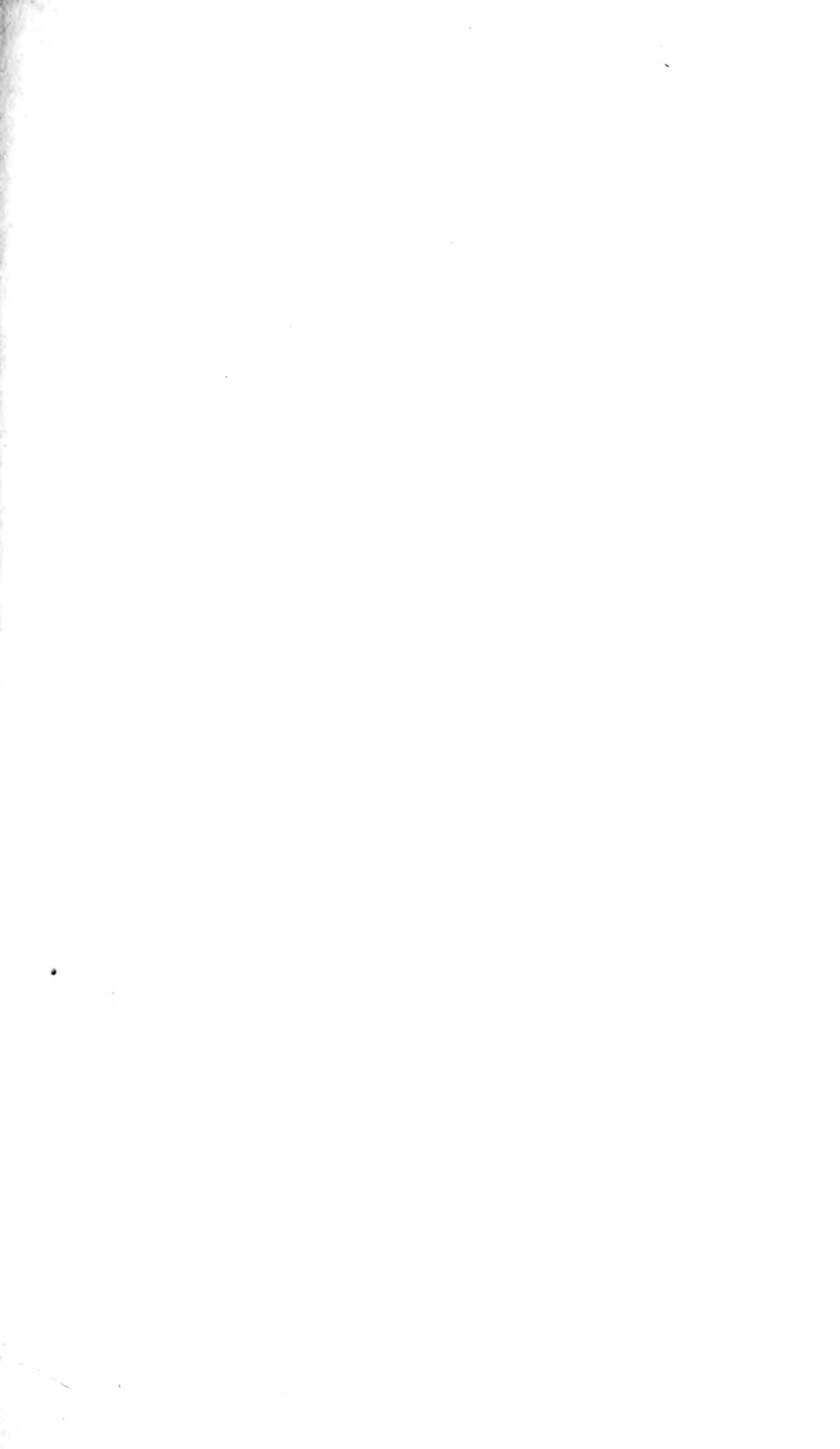
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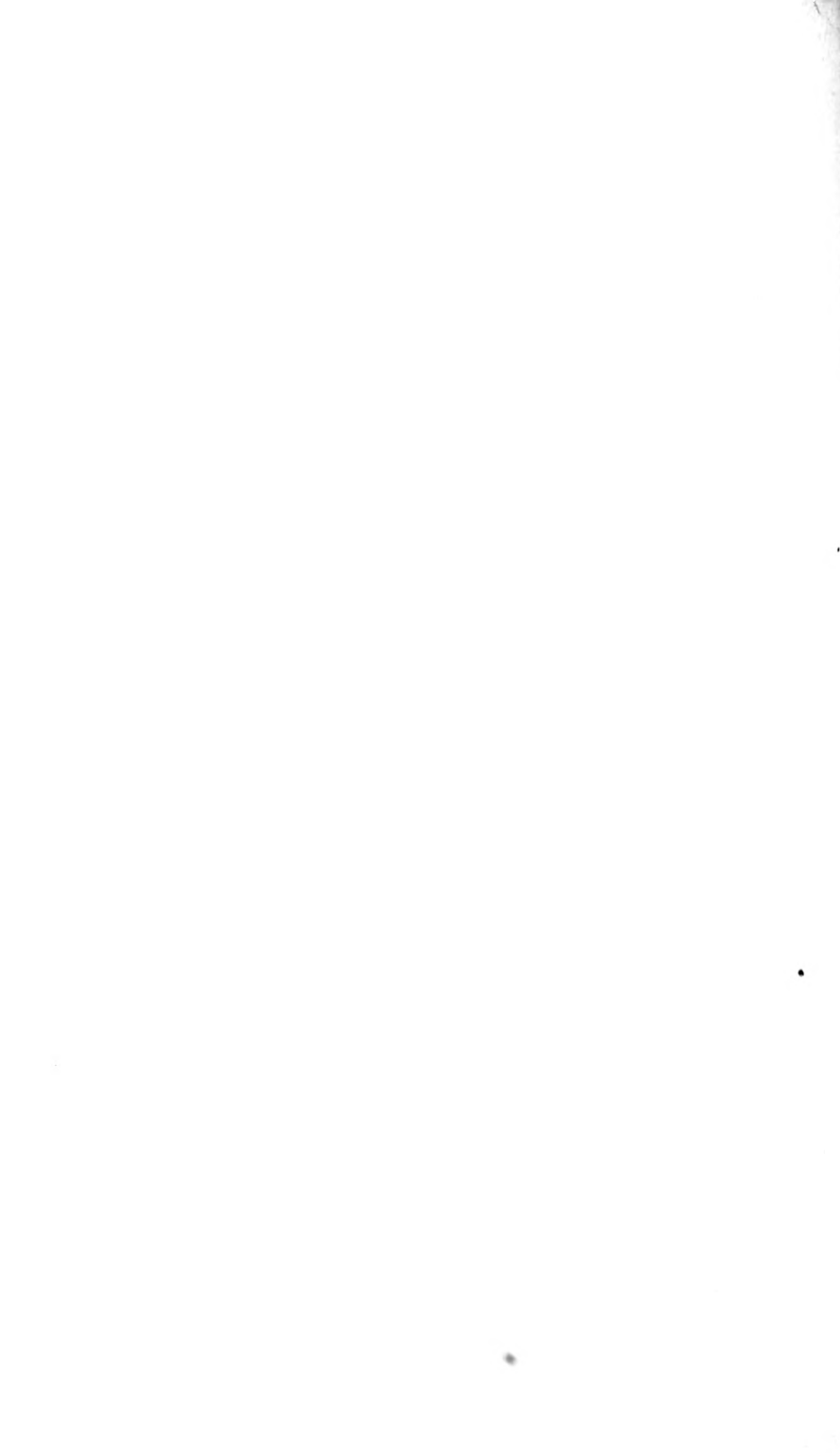
Attorneys for Appellant

EDGAR A. McNULTY

RALPH W. SQUIER

Of Counsel





IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 15773 ✓

PACIFIC GAS & ELECTRIC COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent,

SIERRA PACIFIC POWER COMPANY,
Intervener.

**MEMORANDUM IN REPLY TO PETITIONER'S MEMO-
RANDUM IN OPPOSITION TO MOTION TO DISMISS
PETITION FOR LACK OF JURISDICTION**

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FILED

DEC 23 1957

PAUL P. GILLEN, CLERK

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 15773

PACIFIC GAS AND ELECTRIC COMPANY,
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**MEMORANDUM IN REPLY TO PETITIONER'S MEMO-
RANDUM IN OPPOSITION TO MOTION TO DISMISS
PETITION FOR LACK OF JURISDICTION**

In the "Points and Authorities" contained in the memorandum of petitioner (PG&E) filed in opposition to the motions filed by the intervener (Sierra) and the respondent Federal Power Commission (the Commission) to dismiss the petition to review herein, PG&E argues first that the question of the circuit in which a petition to review an administrative order may be brought is one of venue and not of jurisdiction. Secondly, in an effort to distinguish the *Hicks* and *Morris* cases, PG&E argues that the Commission's order sought to be reviewed herein

was issued pursuant to the mandate of the Supreme Court (*FPC v. Sierra Pacific Power Co.*, 350 U. S. 348 (1956)) and not the mandate of the Court of Appeals for the District of Columbia Circuit (*Sierra Pacific Power Co. v. FPC*, 223 F. 2d 605 (D.C. Cir. 1955)), and that it deals with entirely different issues of fact and law than did the earlier order which was set aside by those courts.

I

The issue here is one of jurisdiction and not of venue.

PG&E's contention as to venue is readily disposed of: while it is true that the initial choice of the circuit in which to review administrative proceedings is a matter of venue, the law is clear that after one circuit has taken jurisdiction, its jurisdiction is exclusive, and extends to a review of an order issued pursuant to a remand issued on the initial review. We think this is amply illustrated by our citation of the *Hicks* and *Morris* cases in our Points and Authorities.

PG&E seeks to distinguish the *Morris* case on the narrow and technical ground that there a mandate of a court of appeals was involved while in the case at bar the mandate of the Supreme Court is involved; and to bolster that meaningless distinction with the argument that the District of Columbia Circuit is no better equipped than this Court to decide the issues presented by this appeal. As to the supposed ground of distinction, to meet technicality with technicality, it is necessary only to point out that it is the mandate of the District of Columbia Circuit which must be construed in this appeal and on that point the *Morris* case is entirely clear and unequivocal:

“We cannot believe that an appellate court of another jurisdiction can determine whether a mandate of the appellate court first acquiring jurisdiction was properly followed.” (116 F. 2d at 898)

With respect to the argument that the District of Columbia Circuit is not better prepared to determine the issues on this appeal than is this Court, we refer the Court to the annexed affidavit of William C. Chanler from which it is apparent that all the issues in controversy under the petition to review involve conflicting contentions as to the effect and construction of the proceedings before the District of Columbia Circuit as they may be affected by the proceedings before the Supreme Court. Sound judicial administration, as well as the clear law of the *Morris* case, require this appeal to be heard by the District of Columbia Circuit.

PG&E's attempt to distinguish the *Hicks* case is again a technical and narrow one. Its argument is simply this: the *Hicks* case involved two appeals from the same administrative order; this case involves two administrative orders; therefore the *Hicks* case does not apply. Neither the facts of this case nor the meaning of the *Hicks* case is as simple as that. The Supreme Court clearly held in the case at bar that determinations under Sections 205 and 206 of the Federal Power Act would both be parts of the same proceeding. Indeed, the order here sought to be reviewed is based in part on the record made in the proceeding already reviewed by the District of Columbia Circuit. And the meaning of the *Hicks* case (quoted at page 13 of our Points and Authorities) is clearly that the court of appeals first taking jurisdiction of part of an administrative proceeding thereby acquires exclusive jurisdiction over all parts of that proceeding.

It is clear that the District of Columbia Circuit, having first acquired jurisdiction of part of this controversy, has thereby acquired exclusive jurisdiction of the entire controversy and is the only forum that can hear this appeal. No other conclusion would be compatible with efficient judicial administration and the intent of Congress. As the Court of Appeals for the Second Circuit expressly pointed out in the *Morris* case, "The appeal taken * * * from [the first Commission] order * * * gave the first circuit 'exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part' * * *. *We cannot doubt that it has exclusive jurisdiction to determine the character of the order to be entered upon its mandate*" (116 F. 2d at 898). (Italics added.)

II

It is clear from the history of the litigation out of which the present petition arises that the order here sought to be reviewed arises from the mandate of the Court of Appeals for the District of Columbia Circuit as affirmed in slightly different form by the Supreme Court of the United States, and that the issues on this appeal relate exclusively to a construction of that mandate and of the opinions of the Court of Appeals and Supreme Court in the prior proceedings.

Because of the aforementioned points raised by petitioner in its memorandum regarding the nature and origin of the order under review, it became necessary for counsel on the oral argument to outline the history of the litigation, and in doing so, to go somewhat beyond the record presently before the Court. In his reply

counsel for PG&E took exception to this "excursion outside the record" but also challenged the correctness of many of the statements made by Sierra's counsel. It of course is not for this Court at this time to determine the merits of these controversies. Their significance so far as this motion is concerned is that, as they go largely to the merits of the issues raised by the petition to review, they conclusively demonstrate our basic contention that the decision of those issues would require this Court not only to review and pass upon the mandate issued by the Court of Appeals for the District of Columbia Circuit under the directions of the Supreme Court and determine what was or was not decided in the decisions of those courts, but also to determine the several issues as to the extent, if any, to which the Supreme Court's opinion differed from that of the Court of Appeals, whose order the Supreme Court affirmed.

However, in order to complete the record, an affidavit is annexed hereto primarily so that this Court may have before it excerpts from the record upon which the statements made during oral argument were based. No doubt counsel for PG&E in its reply will again take issue with the conclusions drawn as to what that record may disclose, and, more particularly, as to the meaning and effect of the mandates of the Supreme Court to the Court of Appeals for the District of Columbia Circuit and of that Court of Appeals to the Federal Power Commission. If they do so, we submit that that will conclusively demonstrate that these issues can properly be determined only by the Court of Appeals for the District of Columbia Circuit.

Moreover, even if the factual disputes developed at the oral argument were not in existence, decision on PG&E's

appeal would still require a construction of the mandate of the Court of Appeals for the District of Columbia Circuit. It is our contention that the sole reason for remanding the case to the Commission was to authorize the Commission if it so desired to hold proceedings on the basis of the existing record instead of instituting a new proceeding. Such a remand gave PG&E no right to do other than request the Commission to reopen. The Commission's denial of such a request addressed to its sole discretion is in our judgment non-appealable. PG&E, on the other hand, has contended throughout that the remand required the Commission to hold further hearings and make further findings. Clearly, there is a controversy necessarily involving a construction of the remand.

CONCLUSION

The petition to review should be dismissed.

Respectfully submitted,

WILLIAM C. CHANLER,
WINTHROP, STIMSON, PUTNAM & ROBERTS,

GREGORY A. HARRISON,
BROBECK, PHLEGER & HARRISON,

WILLIAM C. CHANLER,
Attorneys for Intervener,
Sierra Pacific Power Company.

Certificate of Service

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing copies thereof properly addressed to:

Howard E. Wahrenbrock, Esq. (Via Air Mail),
Solicitor, Federal Power Commission,
Washington 25, D. C.

F. T. Searls, Esq. (Via Air Mail),
245 Market Street,
San Francisco 6, California.

Of Counsel,
Sierra Pacific Power Company.

December 21, 1957.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 15773

PACIFIC GAS AND ELECTRIC COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent,

SIERRA PACIFIC POWER COMPANY,
Intervener.

AFFIDAVIT

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

WILLIAM C. CHANLER, being duly sworn, deposes and says:

I am one of the attorneys for the intervener herein, Sierra Pacific Power Company (Sierra), and make this affidavit on the basis of personal knowledge of all proceedings out of which the order sought to be set aside arises. The proceedings before the Federal Power Commission bear Docket Nos. E-6482 and E-6697, and the

opinions of the courts resulting from those proceedings are reported as *Sierra Pacific Power Co. v. FPC*, 223 F. 2d 605 (D.C. Cir. 1955), *modified*, 237 F. 2d 756 (1955), and *FPC v. Sierra Pacific Power Co.*, 350 U. S. 348 (1956), *motion denied*, 351 U. S. 946 (1956). The petitioner herein, Pacific Gas and Electric Company (PG&E) was a party to all the proceedings referred to. The Federal Power Commission is hereinafter referred to as the Commission.

As stated in the memorandum preceding this affidavit, the purpose of this affidavit is to substantiate statements made by me in the oral argument before this Court and to demonstrate that the issues on PG&E's petition to review cannot be decided without construing the mandate of the Court of Appeals for the District of Columbia Circuit in the *Sierra* case.

1. The basis of my oral statement as to the facts leading up to the original Commission order of June 17, 1954, which was disputed by opposing counsel, is contained in the opinion of the United States Court of Appeals for the District of Columbia Circuit in *Sierra Pacific Power Co. v. FPC*, *supra* at 606. In its opinion, that Court succinctly stated the facts as follows:

"In 1938, Pacific Gas and Electric Company, a public utility under the laws of California, and Part II of the Federal Power Act, entered into its second 15-year contract to sell electric energy to Sierra Pacific Power Company, a public utility under the laws of California and Nevada. With the end of World War II, it became apparent that before expiration of this contract in 1953 Sierra's rapidly increasing demands would require either the construction of an additional transmission line into its area by P G & E, or the development of a

new source of power. Accordingly, in 1947 Sierra commenced negotiations with P G & E and the Bureau of Reclamation which offered to furnish power from Shasta Dam.

At first P G & E offered a 15-year contract at the 1938 contract rates but with an 'escalator fuel clause.' Sierra rejected this and turned to intensive negotiations with governmental agencies for 'cheap Government power.' P G & E then proposed a lower rate (the so-called P-31 schedule) for the same term without the escalator clause. This proposal was accepted in June 1948 and embodied in a contract which was duly filed with the California Public Service Commission and the Federal Power Commission. The P-31 schedule was a lower rate approved by the California Public Service Commission (formerly Railroad Commission) to enable P G & E to retain business of customers that would otherwise 'be lost altogether' to public power competition. But a significant condition of this approval was that any loss from such service would be borne by P G & E's stockholders and not by its other customers.

In 1952, however, when public power from Shasta Dam was no longer available to Sierra, P G & E sought the California Commission's approval for rate increases for Sierra and other customers under the P-31 schedule [Note 2: "With the significant exception of one city [Redding] which could still have utilized Shasta Dam power."] The Commission refused on the ground that the special contracts were entered into 'in order to forestall alleged government competition and with the clear understanding that its stockholders must bear any burden * * *.' In February 1953, in a further effort to increase its rates, P G & E filed the schedule of increased rates in question here with the Federal Power Commission under §205 of the

Federal Power Act. Sierra thereupon intervened. It urged that §205, which provides for Commission approval of newly proposed rates merely upon a finding that they are reasonable, is not applicable where, as here, approval would effect unilateral abrogation of a duly filed rate contract; that to effect such abrogation the Commission must first make the determination, provided for in §206(a), that the rate contract to be superseded is 'unjust, unreasonable, unduly discriminatory or preferential * * *.'''

2. The authority for my statement that the California Public Utilities Commission refused to permit PG&E to increase its contract rate with Sierra in 1952 on the ground that the rate had been entered into for the purpose of meeting competition, which statement was challenged on the oral argument, is found not only in the reference thereto in the foregoing statement of the Court of Appeals for the District of Columbia Circuit, but also in the following statement of the California Public Utilities Commission in its order refusing to allow such increase:

"Among the special resale contracts which applicant seeks to alter in this proceeding is one involving the sale of electric energy at wholesale to Sierra Pacific Power Company at the Sierra summit. The present contract, dated March 4, 1948, was approved by this Commission in Decision No. 41537. This agreement was a renegotiation of prior contracts extending as far back as 1923 covering this point of delivery. The contract covered, in addition to rate structure, other features of delivery including building of additional lines on the part of both parties and the establishment of a contract term of fifteen years to provide protection to both parties. This contract was concluded after negotiations extending over about a year's time. * * *"

* * * * *

“In connection with these special contracts, we point out that the applicant [P G & E] *in order to forestall alleged government competition*, requested authority from this Commission to enter into said contracts with the clear understanding that its stockholders must bear any burden which the applicant might sustain as a result of the operation of any such contracts. Therefore, equity calls for the treatment which we have accorded to these special contracts.” (*Re Pacific Gas & Electric Company*, 96 P.U.R. (N.S.) 493, 524-526 (October 15, 1952)) (Italics added)

The foregoing order was introduced as Exhibit 17 in Docket No. E-6482 before the Commission.

3. As authority for my statement on the oral argument that the meaning of the rate contract between Sierra and PG&E had not been “left open” by the Commission and had not remained undetermined, as contended by counsel for PG&E, I refer, first, to PG&E’s petition for a writ of certiorari in *FPC v. Sierra Pacific Power Co.*, *supra*. In that petition, under “Questions Presented”, Mr. Searls, PG&E’s chief attorney in the present case, stated:

“1. Does the rate filing procedure prescribed by Section 205 of the Federal Power Act for obtaining a rate increase apply to Petitioner’s rate for electric power service to Sierra Pacific Power Company, *such rate being embodied in a contract between the two companies?*” (Italics added)

Secondly, in its opinion in the *Sierra* case the Supreme Court, after referring to the availability of power from Shasta Dam at the time of negotiation of the Sierra-PG&E contract, said:

“To forestall the potential competition, PG&E offered Sierra a 15-year contract for power at a special low rate, which offer Sierra finally accepted in June 1948.” (348 U. S. at 352)

Thirdly, the Supreme Court concluded in that opinion, on the basis of its decision reached the same day in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U. S. 332 (1956), “* * * that neither PG&E’s filing of the new rate nor the Commission’s finding that the new rate was not unlawful was effective to change PG&E’s contract with Sierra.” This holding was the same as that made on the same point by the Court of Appeals for the District of Columbia Circuit in its opinion below, and it was this holding by which the Commission found itself bound in the order sought to be reviewed when it said, “* * * in our view the Supreme Court’s decision in this matter must be taken as disposing of PG&E’s contention concerning the contractual obligation of the parties under the 1948 contract with respect to rates”. It is plain, therefore, that in asking this Court to find that the Commission erred in refusing to take parole testimony for the purpose of showing that the rate was not “embodied” in a contract and could be changed by PG&E’s unilateral filing of a higher rate, PG&E is attempting to have this Court reverse a decision of the Court of Appeals for the District of Columbia Circuit and affirmed by the Supreme Court of the United States, and to have this Court force the Commission to take action that in the Commission’s view would be contrary to the mandate to it from the Court of Appeals for the District of Columbia Circuit.

4. I stated at the oral argument that PG&E’s petition to review herein erroneously asserted at page 4 that “The

F.P.C. determined that it was unnecessary to decide whether the contract was for a fixed or changeable rate and made no finding on that issue". There is not a word in the Commission's order of June 17, 1954 (which is set forth as Exhibit "B" to PG&E's memorandum in opposition) from which one could draw even an inference that the Commission ever made any such "determination" or was aware of the existence of such an "issue". Nor did PG&E include any request for such a "finding" in the "Requested Findings" which it submitted to the Commission before the order issued and which are set forth on pages 26-27 of Exhibit A hereto. As will be noted from an examination of those "Requested Findings", PG&E was simply asking the Commission to make the very findings which formed the basis of the reversal of the Commission's order by the courts. The contention that PG&E's principal contention before the Commission related to the meaning of the contract but that the Commission refused to make a finding on that issue is pure fiction.

The petition to review correctly states, however, that PG&E "contended that the contract rate was not meant to be fixed for the term of the contract, but was intended and understood by the parties to be subject to change if Pacific's costs of service changed, subject, of course to regulatory approval" (Pet. to Rev. p. 4). Pages 5 to 15 and 19 to 25 of Exhibit A hereto, which is a true and complete copy of PG&E's reply brief before the Commission in 1954, show the detail in which this contention was made. But as appears both from the fact the argument was primarily contained in a reply brief, and from the point headings contained therein, and as is conceded in the petition to review at page 4, this argu-

ment was not advanced as an affirmative contention but in reply to Sierra's contention that it was so well understood that the contract *did* provide for a fixed term that as a matter of equity the Commission should not permit PG&E to violate its contract, even if the Commission deemed that it had the legal right to do so.

Moreover, what the petition to review fails to state is that PG&E presented the very same contention to the Courts, which passed upon it and decided it adversely to PG&E. For example, pages 26 (middle) to 35, inclusive, of PG&E's reply brief before the Supreme Court of the United States were, with minor editorial changes, exact copies of pages 9 to 15 and 22 to 25, inclusive, of the reply brief before the Commission set forth as Exhibit A hereto. Thus the "issue" as to the meaning and intent of the contract which PG&E now seeks to raise in this Court was fully litigated and decided by the Courts in the original proceeding.

5. PG&E contends that the Supreme Court "reversed" or substantially changed the decision and mandate of the Court of Appeals for the District of Columbia Circuit and that therefore the Commission's order now sought to be reviewed was issued solely pursuant to that mandate and not that of the Court of Appeals.

The last sentence of the opinion of the Supreme Court reads as follows:

"We shall therefore affirm the order of the Court of Appeals, with instructions to remand the case to the Federal Power Commission for such further proceedings, not inconsistent with this opinion, as the Commission may deem desirable." (350 U. S. at 355)

It is true, as urged by PG&E, that the form of this mandate differed somewhat from the last sentence of the opinion of the Court of Appeals which, was modified on Sierra's motion to read as follows:

“For the foregoing reasons, the order under review is set aside and the case remanded to the Commission with instructions to dismiss the proceeding, without prejudice to the initiation of a new proceeding under §206(a).” (237 F. 2d at 756)

But, as indicated on the oral argument, this difference arose from the following two circumstances:

A. In referring to the Commission's statement in its order of June 17, 1954, to the effect that if it were necessary to make such a finding it would have to find “that the 1948 rate is unreasonably low and therefore unlawful”, the Court of Appeals said:

“This statement, however, is based entirely upon a record made in a proceeding under §205(e) in which the unreasonableness of the contract rate was not in issue.” (223 F. 2d at 609)

The Supreme Court on the other hand pointed out that there was no such thing as a different “proceeding” under Section 205(e) or Section 206(a) of the Federal Power Act; that these sections merely set forth the powers of the Commission which the Commission could exercise in any hearing, and that therefore if the Commission had made proper findings it could have set aside the contract as against the public interest in the original proceeding, regardless of whether or not it had been commenced under Section 205(e). Accordingly, the Court of Appeals' attempt to differentiate between the two types of “proceedings” was no longer appropriate.

B. As stated at the oral argument before this Court, the undersigned agreed in the Supreme Court that the order of remand should be so drawn as to authorize the Commission to make a determination under Section 206(a) on the basis of the existing record, without the necessity of holding further hearings unless the Commission so desired. This agreement is shown in the following footnote 10 appearing in Sierra's brief in the Supreme Court at page 32:

“PG&E and the Commission also both complain that it would be an undue burden on the parties as well as on the Commission to compel the Commission to begin all over again with a new proceeding and the taking of new testimony, under 206(a). With this contention we are in sympathy. In making our motion to amend the opinion in the Court below we had assumed that in a new proceeding initiated by the Commission under 206(a) the Commission could act on the existing record, with such additional evidence as any party might desire to add. If there is any doubt as to this, we would have no objection to the order being further amended so as to provide that the case should be remanded to the Commission ‘with instructions to dismiss the proceeding under 205 without prejudice to the continuation of further proceedings under Section 206(a)’ instead of expressly requiring the ‘initiation of a new proceeding under Section 206(a)’, as it does now. But there can be no doubt that unless the 1948 rate contract is regarded as a complete nullity, the Section 205 proceeding must be dismissed before any further steps can be taken under Section 206(a).”

But whatever the basis of the Supreme Court's action may be, I submit it is plain from the foregoing that the

resolution of this controversy depends on the extent to which, if any, the Supreme Court intended to change the decision of the Court of Appeals on the merits—despite the fact that its judgment read, “the judgment of the * * * Court of Appeals * * * is hereby, affirmed * * *”. Obviously this is a controversy which should be settled in the first instance by the Court of Appeals for the District of Columbia itself.

6. In support of my contention that the issues on this appeal relate to the construction and meaning of the opinion and mandate of the Court of Appeals for the District of Columbia Circuit as the same was modified in part for the foregoing reasons by the Supreme Court, I respectfully refer this Court to PG&E’s original motion before the commission to reopen the proceedings, which is the motion allegedly erroneously denied by the order here sought to be reviewed and a true copy of which is annexed hereto as Exhibit B. As will more fully appear therein, PG&E there argued that the mandate required the Commission to reopen the proceedings and, among other things, to make a retroactive determination as to whether or not the contract rate was against the public interest on June 17, 1954. It is and, ever since the decision of the Supreme Court in the principal case, has been Sierra’s contention that the mandate was only permissive and gave PG&E no right whatever to any further hearings, and further, that under the express decision of the Court the Commission had no right under that mandate to make any retroactive determination. Surely this is an issue that requires a construction of the mandate as read in the light of the opinion of the Court of Appeals as affirmed by the Supreme Court.

7. I stated on the oral argument in this Court that it was my belief on the basis of certain cases cited in the motion to dismiss submitted by the Commission (*L. J. Marquis & Co. v. SEC*, 134 F. 2d 335 (2nd Cir. 1943); *L. J. Marquis & Co. v. SEC*, 134 F. 2d 822 (3rd Cir. 1943); *Columbia Oil & Gasoline Corp. v. SEC*, 134 F. 2d 265 (3rd Cir. 1943); *American Power & Light Co. v. SEC*, 325 U. S. 385 (1945)), that if either this Court or the Court of Appeals for the District of Columbia Circuit should deem that equity required that PG&E be permitted to present its petition to review before the latter Court even though the time to file such petition had expired, this could be accomplished by a transfer of the petition filed in this Court to the District of Columbia Circuit. It is true that in the Commission's motion it states that it distinguishes these cases. I submit, however, that the cases show that under proper circumstances, where equity so requires, a petition filed in the wrong circuit inadvertently but without fault can be transferred to the proper circuit even though the time for such a filing may have expired. As stated on the oral argument, if such a transfer were made or requested, I would petition the Court of Appeals for the District of Columbia Circuit to reject the petition on the ground that it appeared on the face of the petition itself that the contentions raised by PG&E are frivolous and sham and that the matters sought to be reviewed are in fact not appealable and that therefore, PG&E is not entitled to any equitable relief. I cite the cases simply to counter any suggestion by PG&E that if the present motion is granted it will be *inequitably* deprived of its day in court. If equity requires, it can still be heard in the right Circuit.

As indicated on the oral argument, on October 1st, 1957, the undersigned sent to counsel for PG&E a copy of a letter which he addressed to the Clerk of this Court asserting that this Court was without jurisdiction to entertain a review of the Commission's order, and citing cases in support thereof. A true copy of that letter is annexed as Exhibit C hereto. If PG&E in good faith wished to attempt to bring the matter here and reserve its right later to bring it before the Court of Appeals for the District of Columbia Circuit, it could of course have filed its petition for review shortly after receipt of that letter, instead of waiting until the time to file such an appeal had practically expired.

William C. Chanler

Sworn to and subscribed before me on }
the 21st day of December, 1957. }

UNITED STATES OF AMERICA

Before the

Federal Power Commission

Washington, D. C.

In the Matter of
PACIFIC GAS AND ELECTRIC COMPANY

**Docket
No. E-6482**

**Reply Brief
of
Pacific Gas and Electric Company**

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INTRODUCTION

In this brief Pacific Gas and Electric Company, seeking authority to increase its rates for electric service to Sierra Pacific Power Company, replies to the brief of the latter company opposing the increase. As in the opening brief the parties will be referred to as Pacific and Sierra, respectively. Since the brief of the Commission's Staff concludes that Pacific has met the burden of proof, imposed upon it by the Federal Power Act and by this Commission's order, to show that the proposed rate is just, reasonable and not unduly discriminatory or preferential this reply will be

directed entirely to Sierra's brief. However, to the extent that the Staff's brief seems to accept, without discussion, some of the contentions of Sierra, this reply is intended to apply to the Staff's brief as well.

STATEMENT OF THE ISSUES

Comparison of the three opening briefs on behalf of Pacific, the Commission's Staff and Sierra reveals agreement on a number of primary facts and principles of law.

It is not disputed that under the present schedule of charges Pacific will receive only a 2.6% return on its net investment in all facilities allocated to service to Sierra. It is stipulated that Pacific is entitled to a 5.5% return for its electric department (T. 675).^{*} Thus Pacific's service to Sierra is producing revenue which yields less than one-half of what would be a fair rate of return. It is also undisputed that the increased charges proposed by Pacific will produce only 4.75% return, a rate of return still well below that stipulated to be reasonable.

The Staff's brief finds that the proposed rate is just and reasonable when measured by the cost of service including return at 5.5%, and concludes that there is nothing to justify departure from that standard as a measure of the reasonableness of the rate (Staff's Brief, p. 34).

To avoid any contention of discrimination against Sierra, Pacific has proposed a rate which will yield only 4.75%, the proposed tariff being equivalent to Pacific's Schedule F. P. C. No. 6 (Supplement No. 1) for service to The California Oregon Power Company and also equivalent to

^{*} References thus are to pages of the transcript of the hearing on this matter.

Pacific's regular filed tariff for intrasate resale service. Neither Sierra nor the Commission Staff find the proposed rate to be unduly discriminatory or preferential (Staff's Brief, p. 31; Sierra's Brief is silent on this point).

Since the reasonable rate of return is 5.5%, to require Pacific to continue to serve Sierra for a return of only 2.6% would amount to confiscation of investment in excess of eight million dollars devoted to service to Sierra.¹

In the face of this obviously confiscatory return Sierra argues that it is in the public interest to require that the present rate remain in effect, "at least as long as Pacific earns more than it would save if Sierra's business were lost or abandoned." This contention requires the assumption that Pacific deliberately entered into a contract in 1948 by which it committed itself to a transmission line investment of more than one million dollars, and agreed to make an additional transmission line investment of similar amount when Sierra's load should require, all on the basis that it would not be *entitled* to any return or depreciation on the investment over a period which may extend until 1979!

This assumption is directly contrary to common sense and to the testimony of both parties that the purpose of the 15-year term of the contract was to protect Pacific's (and Sierra's) investment in transmission lines to be constructed in accordance with the contract for the service to Sierra. Sierra's strained argument simply ignores this fact and fails completely to explain how a rate so long as to be confiscatory is consistent with protection of the investment.

¹ The California Public Utilities Commission, herein called California Commission, in fixing rates subject to its jurisdiction has not permitted Pacific to recover any revenue from other customers to offset the present low return from Sierra.

It is obvious that Pacific could not even recover the cost of borrowed capital to make this investment, let alone provide anything for equity money on such a rate of return.

Without this assumption of a commitment by Pacific to perpetuate the present rate Sierra's arguments have no foundation. This brief will show that there was no such commitment because (1) it is contrary to the terms of the contract both as expressed in the contract and as contemporaneously interpreted by the parties, (2) it is not to be implied from adoption of a schedule of charges equivalent to Pacific's 1945 Schedule P-31 for intrastate resale service, and (3) it is not to be implied as a consequence of the fact that Sierra made the contract with Pacific in preference to a contract for Bureau of Reclamation power which could not be delivered when needed.

The Staff's brief concludes that even if such a commitment were made it should have no bearing on the result since the principle involved is contrary to the public interest. With this we are in accord since a contract requiring such a large additional investment for public utility service which does not permit a recovery of a reasonable return on the investment would be clearly unreasonable.

If Pacific had made a contract on such an improvident basis the Federal Power Act would require this Commission to determine the reasonable and just contract to be in force hereafter (Sec. 206 (a)). However, the evidence demonstrates that Pacific did not make such an ill-advised contract but clearly contracted for protection of its investment and we need not pursue the point further here.

As we understand Sierra's position—and it takes considerable analysis to disentangle the structure of its argu-

ment from its so-called “Abstract of Evidence” and the subdivisions of its “Argument”—this Commission is not bound by a rule of law in this case but is to act on the basis of its determination of the requirements of the public interest. Sierra has virtually abandoned its procedural point, urged in a barrage of petitions and motions demanding a termination of this proceeding as a matter of law, and has conceded that all of the issues are now before this Commission for determination. We would add only that the measure of the public interest is found in the requirement of the Federal Power Act that all charges demanded or received by any public utility “shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful” (Sec. 205(a)).

We submit that a rate of return of 2.6% is not just or reasonable but is confiscatory, and that an increase to 4.75% is justified and reasonable under all the circumstances. We turn now to our reply to Sierra’s attempt to argue the contrary.

I.

SIERRA AND PACIFIC AGREED ON A TERM CONTRACT SUBJECT TO CHANGE BY REGULATORY PROCESS FOR PROTECTION OF THEIR ADDITIONAL INVESTMENTS IN TRANSMISSION FACILITIES.

A. This Commission Has Jurisdiction to Change the Present Contract Rate.

Sierra concedes, as it must, that the present service contract is subject to such changes as this Commission may direct in the exercise of its jurisdiction (Sierra’s Brief, p. 50). If, as Sierra indicates, this must be deemed an express provision of the service contract, then it is difficult to see how Sierra can contend that the parties contemplated an

unchangeable rate. Indeed, we suppose that if Pacific's cost of service to Sierra had declined sufficiently Sierra would have demanded and been entitled to receive a reduction in the rate.

It is interesting to note that Sierra's brief nowhere states that Pacific *agreed* that the rate should remain unchanged for the entire contract term. Such a proposition too obviously flies in the face of the facts.² Yet, paradoxically, Sierra also contends by argument in its "Abstract of the Evidence" (pp. 30-31) and in its Point I (p. 48) that Pacific is committed to an unchanging rate. If all that Sierra means is that the present rate was intended to remain fixed until changed by the rate making process we do not quarrel with its position. Pacific has never contended that it had any arbitrary power, or, independently of regulatory process, any power at all to change its rate to Sierra. On the other hand, Pacific has always intended and understood that it may initiate a change in its rate to Sierra, just as in any other rate, through established regulatory procedure. That is exactly the course which it has followed here. The implied reservation to the Federal Power Commission of authority to modify the contract is the basis for Pacific's action.

Pacific does not claim to be able to place in effect any increase in its charges to Sierra unless it sustains its burden of establishing before this Commission that the increase is just and reasonable in a proceeding which gives full opportunity to Sierra to be heard and to oppose the increase if it chooses. In the light of fair analysis Sierra's attempt to argue by epithet that change by this process is "repudia-

² See Pacific's Brief, pp. 21-25.

tion''^{2a} or renders the contract "nugatory and valueless" becomes baseless accusation. Similarly, for Sierra to argue that its management cannot conduct its business on the basis of a contract subject to change by regulatory process is to deny the experience of every electric and gas utility dependent upon wholesale purchase for its supply of energy and gas.

B. Pacific Did Not Give up Its Right to Invoke the Rate Making Process to Increase Its Rate to Sierra.

Sierra could not concede, however, that the service contract is subject to change in the normal course of regulation without undermining its case. If Pacific could invoke the normal regulatory process for a rate increase Sierra could not claim that Pacific had voluntarily assumed the burden of increasing costs. It therefore attempted to prove that Pacific gave up this right when it executed the service contract without an express provision that the rate was changeable by the normal rate making process (Sierra's Brief, p. 48). We would have thought that the express and implied reservations of authority to the California and Federal Commissions to change the contract (Sierra's Brief, p. 50) were adequate expressions of Pacific's intention but Sierra ignores them. Instead Sierra attempts to draw a conclusion from comparison with Pacific's Schedule F.P.C. No. 6 for service to The California Oregon Power Company. That

^{2a} The term "double dealing repudiation" which counsel for Sierra has seized upon so enthusiastically was used by counsel for Pacific only with reference to a contract with the City of Redding made about four months before the filing of the rate increase application from which the contract was voluntarily excepted by Pacific. This contract was made after a public election in Redding in which the voters expressed their choice for a contract with Pacific in preference to a concrete proposal from the Bureau of Reclamation. See California Public Utilities Commission Decision No. 43147, issued July 26, 1949 (not printed).

schedule contains a formula provision for adjustment of the rate to correspond with changes in Pacific's regular filed resale tariff for intrastate service.³ It should be evident that this formula, incorporated in a 1952 contract after Sierra had contested the right of Pacific to obtain a rate increase, was adopted to forestall the argument made here. It cannot aid in the interpretation of a contract made four years earlier when there was no such contest.

It is even weaker for Sierra to argue (its Brief, "Abstract of the Evidence," p. 31) that the fact that a comparison was made by Sierra between Pacific's present rate and the Bureau of Reclamation's proposed rate for a 15-year period evidenced any intention or understanding that that rate could not be changed. This comparison was the only one that could be made between the two rates since future changes in the cost level could not be predicted. It would be absurd for Pacific to argue that the present rate could not be reduced by this Commission for 15 years simply because Sierra had made a 15-year comparison on the assumption of no change in rate level. It is equally absurd for Sierra to argue that for such a reason there can be no increase when fully warranted by increased costs.

Sierra attempts to bolster these arguments with references to testimony given in 1945 before the California Commission by Pacific's rate engineer. We will discuss them in a subsequent section of this brief since they relate to the adoption of the P-31 rate for intra-state resale service and form no part of the understanding between Sierra and Pacific as expressed in their 1948 contract.

³ We do not assume that this formula is binding on the Federal Power Commission. Most of the energy delivered under the California Oregon contract is resold by the purchaser within California.

C. The Contemporaneous Evidence Demonstrates That the Purpose of the 15-Year Term of the Contract Was to Protect Pacific's Investment.

We need not rest our case on the weakness of Sierra's arguments. The direct and positive evidence of the contract itself and the virtually contemporaneous statements in the 1948 hearing before the California Commission prove that the purpose of the 15-year term was protection of the new investment.

Two prior contracts, each of which called for a new transmission line, had 15-year terms. Pacific's first proposal to Sierra in 1947 was for a new line and a new 15-year term. The 15 years was accepted without discussion throughout the negotiations and without relation to the rate.

It is significant that the contract relates the 15-year term to the completion of the new 110,000 volt line and requires a new 15-year term to begin when a second such line is completed and placed in operation to meet Sierra's requirements.

When to this internal evidence of the contract is added the statements of both parties made before the present controversy arose there can be no doubt that the term of the contract was intended to protect their respective investments. As to the reason for the 15-year term, Mr. Pollard testified for Pacific before the California Commission in 1948:

"Well, of course, that was—on our part was in order to guarantee that we would have business for a long enough period of time *to warrant us in making the investment** in the cost of the new line and amortizing it. And, furthermore, followed the same pattern as

* Emphasis ours, throughout the brief.

previous contracts we have had in each of which instances a substantial investment was made for service of this customer. And, similarly, 15-year contracts were taken at each of those times for that reason.” (Ex. 12, p. 12)

In the same proceeding Mr. Tracy testified for Sierra on the necessity for a 15-year contract.

“When load conditions are such that you have to have additional capacity it might be that that additional capacity could be arranged to carry you over for a short period—be sufficient to carry you over for a short period, but in case where you have to go to a relatively large investment it is only fair and business—proper business that the Company you are negotiating with *gets a proper return on the investment for that period*. That is the basis upon which we would operate ourselves, we would not expect anybody to go to a large investment which is necessary in order to give the Company capacity they need for any shorter period than that.” (Ex. 12, p. 26)

In the same proceeding the following occurred on cross-examination of Mr. Tracy:

“Q. This contract effectively tie Sierra’s hands for 15 years, will it not?

A. In what way do you mean?

Q. Well, because of the fact that you are prohibited from developing any further power facilities of your own?

A. No, I do not think that is true. The contract is worded in that way, if the parties have a modification that is justified I think the parties can get together on it. In other words, only the—the principal thing that the selling party would have—I might be corrected on this if I am wrong from P. G. & E. Company—would be

idle investment. In other words, if we had a development that we found feasible and it came in at a time when any investment was [not]⁴ made idle by the P. G. & E. in other words, at a times when they might have to put in additional investment even to serve it, it would not penalize P. G. & E. if we went ahead on it and we could make arrangements with them to do so.” (Ex. 12, pp. 33, 34)

In other words Mr. Tracy believed that Pacific’s primary concern was its investment and that a modification of the contract for Sierra’s benefit would be justified under any circumstance where Pacific’s investment was protected. If Mr. Tracy had exhibited the same reasonable attitude which he expected from Pacific in 1948 toward Pacific in 1952 when requested to renegotiate the present rate in accordance with the order of the California Commission⁵ this proceeding would doubtless have been unnecessary.

In the present proceeding in 1953 Mr. Tracy testified that in his 1948 testimony before the California Commission he gave all the reasons which he could think of in support of the contract (T. 672). The transcript of that proceeding (Ex. 12), will be scanned in vain for any indication that Pacific intended to give up any right to initiate a rate increase or that Mr. Tracy ever had any such understanding. Are we to believe now that it was mere oversight that when the 15-year term was mentioned in 1948, Mr. Tracy thought only of a proper return for Pacific’s investment rather than a guaranteed rate for Sierra, even though he was obviously looking for reasons to satisfy his Nevada opposition?

⁴ The context requires insertion of the “not” at this point.

⁵ Exhibit 17, pp. 41, 46-47, and T. 987, 988.

Not quite two years later, before the California Commission in 1950, Mr. Moulton, Pacific's Vice President and Executive Engineer, explained the difference between the 15-year term of the Sierra contract and the 5-year term of other resale contracts as follows:

"We finally made a 15-year contract with Sierra Pacific. *We made a longer contract because we under-[took]*⁶ *to build an additional line to supply them and we felt we needed that protection of a long contract.*"
(Ex. 15, p. 541)⁷

Even in 1952 after Sierra had determined to oppose any increase by Pacific, Mr. Tracy testified for Sierra before the California Commission on cross examination as follows:

"Q. While the Commissioner has stated that the record in the contract proceedings contains the support for the contract or purportedly it did, you made the statement that you made this 15-year contract because you wanted to have assurance of power supply and that it was the best source of power at reasonable rates. Is it not a fact, Mr. Tracy, that Pacific Gas and Electric Company was insisting on a 15-year contract in order to protect it in a very large investment that it had to make in facilities in order to bring power to the summit to supply to the Sierra Power Company?

⁶ The text has "understood" at this point, clearly a reporter's error.

⁷ This testimony also shows that Sierra is completely mistaken in interpreting Mr. Moulton's testimony as support for its position that the contract rate could not be changed. Mr. Moulton recognizes that the purpose of the 15 year term was to protect the new investment. This testimony was given within a few months after initiation of service over the new 110,000 volt line to Sierra, and the fact that an increase was not deemed warranted at that time does not constitute a bar to an increase under conditions of greatly increased cost.

A. I think that works both ways. Yes, our company wished to have a firm contract too to cover our investment." (Ex. 23, pp. 1418, 1419)

Protection of investment is not accomplished by ignoring diminishing returns. Failure to allow a fair return on property devoted to public utility service is confiscation of that property. To argue that Pacific consented to possible loss of all return for up to 30 years on a new investment in excess of one million dollars is absurd and contrary to the express testimony.

We submit that the evidence establishes without contradiction that Pacific did not give up its right to a rate increase by means of normal regulatory procedure and that it is entitled to a rate of return which will protect its entire investment for service to Sierra.

II.

THE ADOPTION IN THE SIERRA CONTRACT OF CHARGES EQUIVALENT TO THOSE IN PACIFIC'S INTRA-STATE RESALE TARIFF P-31 DOES NOT SUPPORT SIERRA'S CONTENTION THAT PACIFIC COMMITTED ITSELF TO PERPETUATE THAT RATE FOR THE CONTRACT TERM.

When the present contract was being negotiated with Sierra in 1947 and 1948 Pacific had on file with the California Commission two tariffs of general application for intra-state resale electric service to customers who purchased all of their energy requirements from Pacific. One of these, Schedule P-31 (Ex. 20), offered a rate approximately 10% below the other (Schedule P-6, Ex. 8, p. 2) to resale customers who would enter into a five year contract for service. The contract with Sierra did not incorporate the P-31 rate as such. It simply provided a

schedule of demand and energy charges equivalent to those in effect under the P-31 tariff, plus a stand-by charge, and incorporated certain of the conditions of that tariff.

A. The P-31 Rate Was Not a Fixed Rate But Was Actually Increased Twice by the California Commission.

Sierra would argue first that the P-31 rate was established as a fixed rate for the term of each five-year contract and therefore that the Sierra rate is a fixed rate for the 15 to 30 year term of its contract. We have already shown that the conclusion does not follow because the 15 year term was proposed for protection of the new investment long before the P-31 rate entered into the negotiations. The premise that the P-31 rate could not be changed is equally unsound.

The California Commission has twice increased the P-31 rate since its adoption in 1945. The first occasion was in 1950 in response to Pacific's application for a 6% rate increase. The second occasion was in 1952 when the California Commission superseded Schedule P-31 by Schedule R, which is equivalent to the rate proposed in this proceeding. In each of those cases the Commission excepted from the increase certain named customers but the balance were required to pay the increased rate beginning with the effective date of the general increase regardless of the fact that they were being served under term contracts.⁹ This

⁹ As to the 1950 increase of 6%, Exhibit 18 shows that Pacific requested an increase in each of its filed schedules (p. 8) and was authorized to make such increase effective for service from April 15, 1950 subject only to the named exceptions (p. 16). Pacific estimated that it would receive additional revenue of \$140,000 annually from resale customers as a result of this increase (p. 8).

As to the 1952 increase, Exhibit 17 shows that the California Commission authorized cancellation of all existing schedules and

is convincing evidence that the California Commission does not regard the P-31 rate as immune from changes when required by increases in the cost level.

The testimony of Pacific's rate engineer in 1945, to the effect that users of the P-31 rate were assured of the lower rate for a five-year term (quoted by Sierra in its brief at pp. 31, 49), sounds impressive when isolated from its context. We believe, however, that a study of the record of that proceeding will show that Mr. Beckett meant "lower than the P-6 resale schedule" and that he did not have in mind a fixed rate regardless of cost considerations. In any event the California Commission has set the matter at rest by granting the increases above described.

B. Pacific Did Not Give Its Right to a Compensatory Return When It Offered the Equivalent of the P-31 Rate.

The adoption of the P-31 rate level is also used by Sierra as the ground for a contention that Pacific committed itself to a non-compensatory rate level. Sierra argues that because the P-31 rate was conceded in 1945 to be non-compensatory when applied to a class of resale customers which did not include Sierra, therefore Pacific committed itself to a non-compensatory return from Sierra by adopting the same rate level. It should be obvious, however, that the

transfer of customers to the increased schedules applicable to the service rendered, including Schedule R for resale customers (pp. 46, 85) subject only to exception for certain listed contracts.

The exception of Sierra from the 1952 increase was expressly stated by the California Commission to be for the purpose of allowing an opportunity for the parties to renegotiate the contract "in the light of the new basic resale schedule," i.e. Schedule R (Ex. 17, p. 41). The refusal of Sierra to negotiate (T. 988) does not convert this exception into a final disposition of the matter by the California Commission. The matter is pending before that Commission in a new proceeding. See Exhibit 22, pp. 4 and 5.

statement as to the return from a given rate when applied to a certain class of customers is not necessarily true when the same rate is applied to another customer under different circumstances. In 1952 Pacific was able to earn a 2.6% return in its business to Sierra in spite of the sharp increase in costs subsequent to 1948. It should be evident that on the basis of 1948 costs Pacific must have anticipated a reasonable return.

There is no concession in the 1948 proceedings before the California Commission that the Sierra rate was expected to be non-compensatory. A California Commission staff member asked Pacific's witness whether, *if* the rate should prove non-compensatory, no burden would be placed on other customers. Pacific's witness agreed that under such circumstances other customers should not be burdened. We do not see how this can be taken as evidence one way or another as to how much return the Sierra rate was expected or intended to produce, nor as evidence that Pacific's stockholders did not expect to be fairly compensated from Sierra's business.

This Commission will realize, however, that while the new line remained lightly loaded it would hardly be likely to earn a full return. This, however, should not prevent realization of the full earning power of the line as utilization increases. The Staff's method of deriving cost of service and rate of return by averaging in with the system network the special lines devoted to service to Sierra eliminated from consideration the actual loading of these lines and the present 2.6% return thus computed does not reflect any particular stage in the growth of Sierra's load.

C. The Proposed Rate Meets Sierra's Test Since Pacific Will Not Receive More Revenue Under the Proposed Rate Than It Could Save by Abandoning Sierra's Business.

Throughout its argument Sierra is careful to qualify its contention as to maintenance of the present rate by conceding that Pacific is entitled to earn at least as much under the present rate as it would save if Sierra's business were lost or abandoned. We have already pointed out in our opening brief (pp. 29-32) that this reasoning is applicable only to a rate designed to retain existing business served by facilities which otherwise would be idle, and that it does not apply where a substantial additional investment is contemplated. However, even taking at its face value Sierra's test which compares revenues under the proposed rate with the costs which Pacific could save if it abandoned Sierra's business today the rate will qualify.

All of Pacific's investment in generation and transmission capital allocated to Sierra could be used almost immediately to serve other customers on Pacific's system, excepting only the three transmission lines from Drum to Summit. Pacific's load has been increasing at a rapid rate for many years and it is still engaged in expanding its generation and transmission capacity to meet the growing demands on its system. The increase in Pacific's sales of energy during 1952, as shown on page 69 of Pacific's Form 1 report to this Commission for that year, was 3.75 times the entire amount of Sierra's load for the year. Loss of Sierra's business then would simply mean freeing capacity for use elsewhere on the system.

The rate base allocated to Sierra by the Staff method (Ex. 19) consists almost entirely of generation, transmission and common utility plant and includes only 1.4% of

the \$1,861,765 invested in the three transmission lines used to serve Sierra. This results from the fact that the investment in these lines is treated as part of the system network, 1.4% of which is allocated to Sierra.

It follows that the cost of service derived by the Staff's method does not include more than a negligible amount for depreciation or return and related income tax on the investment in the three transmission lines. To put the matter in another way, if Pacific should lose Sierra's business today, substantially all of the \$8,489,633 of capital investment allocated to Sierra would shortly be used to serve other system load and would be expected to earn a fair and reasonable return.

The same result will be reached if Sierra's erroneously conceived test is applied to Pacific's derivation of a rate of return (Ex. 4). In Pacific's computation the investment in the three lines is allocated directly to service to Sierra and all of it appears in the rate base. The revenue under the proposed rate falls short of full costs of service by \$725,000 per year, a deficiency far in excess of any conceivable depreciation, return and related income tax allocable to the three lines. See Pacific's Brief, pp. 6, 7 and Appendix.

The conclusion of counsel for Sierra that the fact that Pacific earns some return shows that it is earning more than it could save if it lost the business is a superficial conclusion not supported by an analysis of the rate base on which the return is earned. On the contrary, it must be concluded that from the standpoint of Sierra and its customers, the proposed rate is as low as could reasonably be permitted by any method of cost calculation and by any test which has been suggested.

III.

THE EXISTENCE OF PUBLIC PRESSURE UPON SIERRA TO CONTRACT FOR BUREAU OF RECLAMATION POWER WHICH COULD NOT BE DELIVERED WHEN NEEDED DOES NOT JUSTIFY THE CONTENTION FOR A RATE FIXED REGARDLESS OF COST.

A review of the record in this case and the three opening briefs will show that "competition" is a word of many meanings. Counsel for Sierra profess amazement that we should deny the existence of competition with the Bureau of Reclamation, whereas we fail to see how they can label a situation competitive when the consumer has only one feasible source for the supply of its needs. Despite this diversity of opinion as to what constitutes competition there is substantial agreement as to the facts of the situation and we propose to talk about those facts.

The first fact is that Sierra needed a substantial amount of additional power to meet its load requirements in 1949 and 1950.

The second fact is that the Bureau did not even hope to obtain appropriations from Congress and complete a single circuit line to serve Sierra before 1951 and probably not until 1952. The Bureau of Reclamation thus had no way of supplying Sierra's 1949 and 1950 requirements for additional power.

The third fact is that Bureau power as a source of supply for Sierra would have had many disadvantages even after service was initiated. Chief among these were (1) reliance on 125 miles of single circuit line, (2) reliance on a single hydroelectric project which could be affected by adverse water conditions, (3) requirements for standby service at

“prohibitive” additional cost (Ex. 12, pp. 28, 31), and (4) the Bureau requirement that Sierra “wheel” power to municipalities and public agencies entitled to “preference” under reclamation law (Ex. 21, p. 17, par. ii).

The fourth fact is that in 1947 and 1948 there was considerable agitation in Northern and Central Nevada to get “cheap” government power. Public sentiment was aroused and Sierra was under pressure to make some sort of arrangement for obtaining power from the Bureau of Reclamation.

These facts are not disputed and whether counsel for Sierra labels the Bureau as a “competitive” source of power is really immaterial. The label adds nothing, but when counsel try to argue that Sierra lost a bargaining position when it entered into the contract with Pacific they have to insist on the label and ignore Sierra’s actual situation. Realizing, however, that the facts are inescapable, they try to make it appear that Sierra had a choice between two feasible sources of supply. To do this they have resorted to invention.

That awkward gap between 1948 and 1951 in Sierra’s power resources, if it chose to contract for Bureau Power, is “tided over” (Sierra’s Brief, pp. 39 and 66) by counsel’s construction of the Walker River development. Since both Sierra’s President and its engineer are agreed that construction of that project would have taken a minimum of three years (Ex. 12, p. 34; T. 745), Sierra would still have been short of power in 1949 and 1950, even if it decided to construct the Walker River project in the face of high costs.

The statement of the 1953 Nevada Public Service Commission (Ex. 22, p. 2) containing its views as to the position

of the 1948 Commission,¹⁰ suffers from the same infirmity as the argument of Sierra's counsel. That Commission now states that if it had, in 1948, doubted the "validity" of Sierra's contract it would have ordered Sierra to construct hydroelectric plants on three rivers and a supplementary steam plant. Thus Sierra would have had to invest unknown millions of dollars in high cost hydro plants and a steam plant to be operated at low load factor with high fuel costs,¹¹ none of which could have been constructed in time to meet its 1949 and 1950 requirements. While we doubt the authority of the Nevada Commission to issue such an order we doubt even more that in 1948, faced with the practical requirements of the situation, it would have seriously entertained such an idea.

Disregarding the time required for construction of new plants and disregarding their high cost of construction and operation, counsel for Sierra reach new heights of economic absurdity when they contend that these additional plants would have been developed "to tide over the expected shortages until the Bureau's lines were adequate to meet all possible needs." Neither of Sierra's witnesses testified that capital investment in any of these plants could be justified on a

¹⁰ Neither of the two members of the Nevada Commission who appeared in the 1948 hearings before the California Commission is now a member of the three-man Nevada Commission, according to the letterhead in Exhibit 22.

¹¹ It will be recalled that Mr. Tracy's opinion that he could produce steam generated power for 7 to 8 mills was based on the assumption (1) that he generated *all* his power requirements in the steam plant and (2) that fuel was at the 1946 Reno price of \$2.05 per barrel. It will also be recalled that Mr. Tracy was very much opposed to Pacific's original proposal of a fuel escalator clause. If Sierra operated a steam plant of its own its costs would escalate immediately with each rise in fuel oil prices.

“tiding over” basis, nor did they give any explanation at all as to how the shortage in 1949 and 1950 could have been met.

The fact of the matter is that although counsel for Sierra is correct in stating (Sierra’s brief, p. 19) that in October 1947 Sierra had before it a proposal from Pacific and a “plan” of the Bureau of Reclamation and the Colorado River Commission, the latter “plan” fell so far short of meeting Sierra’s needs that Sierra never did make a serious endeavor to find out whether, or at what cost, the deficiencies in the Bureau’s plan could be made up.

Nor did Sierra ever act like a buyer playing one competitor against another. Mr. Tracy explained to Pacific’s General Manager in October of 1947 that his Company was not prepared to continue negotiations, that there was local political pressure to bring Shasta power into Nevada which *hampered Sierra’s* negotiation and that Sierra could not afford to offend Shasta power advocates (Ex. 27, p. 4, statement of Pacific’s General Manager October 8, 1947 at meeting of President’s Advisory Committee). It is evident that Pacific was not given the impression that Sierra found anything desirable in the proposal for Bureau power. Instead Mr. Tracy was making it clear that he was faced with public pressure urging “cheap” government power and ignoring the practical requirements of the situation. The following testimony given by Mr. Tracy during cross examination by Mr. Wahrenbrock in this proceeding illustrates this point:

“Q. Mr. Tracy, when Pacific Gas and Electric gave up the fuel escalator clause and submitted the proposed form of contract to you after the agreement on the demand and energy charge, what was your opinion as to why they were willing to give up that clause, which would have tended to protect them against at least one of the larger elements of risk in so long a term contract?

[Objection by Mr. Searls on ground of irrelevancy overruled]

* * * * *

A. They did not inform me as to the reason and I certainly would not take it upon myself to guess.

By Mr. Wahrenbrock.

Q. Did you think you had outsmarted them on that?

A. No. That isn't the correct answer. We thought that we had showed them sufficient reasons for proposing to us a lower rate.

Q. Namely the threat of taking your load someplace else.

A. The potential competition that was *very prevalent*. *The papers were full of it*. As I testified before, all the groups were active. The Chamber of Commerce had a power committee." (T. pp. 937, 938)

Notice that Mr. Tracy declined to state that he threatened to take his load elsewhere. To him the word "competition" seems to be synonymous with "public pressure" since he stated in his testimony that even after the contract with Pacific was signed and approved by the California Commission, he was bothered by "competition" (T. 939).

In the face of all this evidence, which boils down to the fact that Sierra could not get the power it needed except from Pacific and the fact that any alternative was bound in the long run to mean high but uncertain costs when all factors were taken into account, Sierra's argument that it gave up a bargaining position or that either it or its customers have lost anything by making a contract with Pacific for service at a rate subject to regulatory change is without foundation.

"The papers were full" of competition and it was "very prevalent," but this sort of competition was more of a problem to Sierra than to Pacific. Sierra had no illusions about

the desirability of a contract for Bureau power as is demonstrated by Exhibits 30, 32, and 34, consisting of intra-company communications which list Mr. Devore's or Mr. Tracy's objections to such an arrangement.

Sierra was not making fine calculations to determine the cost of various alternatives nor was it trying to extract from Pacific an agreement for an unchangeable rate. The 15-year term was important from the investment standpoint but was actually considered objectionable by some public power proponents who did not like Sierra to be tied up for such a period at any price. Sierra endeavored to and did obtain the lowest available rate from Pacific but this was a standard rate, available to qualified resale customers whether or not they had competitive sources of supply.

Pacific undoubtedly felt the effect of the public pressure and reexamined its position that the P-31 rate level was not adequate (Ex. 27, p. 4). When it concluded that it could offer this rate it did not expect that it would be fixed in the face of cost changes. The argument to the contrary seems to be only that because Pacific came down in its price it must be implied that it also gave up its right to the use of the rate-making process. There is no basis for such a conclusion.

When called upon at the California hearing in 1948 to justify making the contract with Pacific, Mr. Tracy attempted to educate the public representatives from Nevada to the facts of the situation which Sierra then faced. He showed that he really had no choice in the matter. He did not claim that the 15-year term was agreed upon to secure a favorable rate; he explained that it was a necessary protection for the new investments to be made. The public representatives were satisfied with this and withdrew their opposition (T. 672).

In a few words, neither Sierra nor public opinion were demanding a fixed rate, nothing in the situation required a fixed rate and nothing in the negotiations, the contract, or the explanations of the contract in the 1948 proceeding ever suggested that a fixed rate had been discussed, much less agreed upon.

CONCLUSION

The issue in this case is whether Pacific's proposed rate increase is just and reasonable under the Federal Power Act. The present rate yields a return so low that its continuance would be confiscatory. Pacific's proposed rate will yield a return of only 4.75%, which is clearly reasonable when compared with the stipulated reasonable rate of return of 5.5%.

Sierra has shown no valid reason why it should be exempted from the increase in costs of generation and transmission of power nor why this Commission should disregard Pacific's need for additional revenue to cover costs of service and maintain its financial integrity.

It is respectfully submitted that Pacific has shown that the present rate is unjust, unreasonable and unduly preferential and that the proposed rate is just, reasonable and not unduly discriminatory. The requested increase should be authorized.

ROBERT H. GERDES

RALPH W. DUVAL

FREDERICK T. SEARLS

*Attorneys for Pacific Gas
and Electric Company*

WHEAT, MAY & SHANNON

ROBERT E. MAY

Of Counsel

REQUESTED FINDINGS

1. Electric power generated and transmitted by Pacific Gas and Electric Company entirely within California is sold at wholesale and delivered to Sierra Pacific Power Company at Summit in California near Donner Pass under Pacific Gas and Electric Company's rate Schedule F.P.C. No. 3, effective as of January 1, 1948.

2. Sierra Pacific Power Company transmits some of the electric power received from Pacific Gas and Electric Company for sale to customers in California and transmits the balance to its customers in Nevada. By far the larger part of the energy received, approximately 86% in 1951, is thus transmitted to Nevada.

3. The sales of power by Pacific Gas and Electric Company to Sierra Pacific Power Company at Summit are sales at wholesale in interstate commerce subject to the provisions of Sections 205 and 206(a) of the Federal Power Act.

4. Pacific Gas and Electric Company's present rate Schedule F.P.C. No. 3 provides revenue which, after proper allowance for all operating expense allocable to service to Sierra Pacific Power Company, yields a rate of return on the net investment rate base properly allocable to such service which is so low that said rate is unjust and unreasonable and constitutes an undue preference to Sierra Pacific Power Company.

5. Pacific Gas and Electric Company's proposed rate increase contained in its proposed Supplement No. 1 to Schedule F.P.C. No. 3 will provide revenue which is less than is necessary to yield a reasonable return on the net investment rate base properly allocable to the service to

Sierra Pacific Power Company, after due allowance for all operating expense allocable thereto.

6. No other facts have been shown affecting the justness and reasonableness of said proposed rate.

7. The proposed rate is just and reasonable.

8. The proposed rate is not unduly discriminatory or preferential.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing answer upon all parties of record in this proceeding by mailing a copy thereof properly addressed to:

Howard E. Wahrenbrock, Esq.,
Assistant General Counsel

Drexel D. Journey, Esq.,
Attorney
Federal Power Commission
441 G Street N.W.
Washington 25, D.C.

Winthrop, Stimson, Putnam & Roberts
40 Wall Street
New York 5, N. Y.

FREDERICK T. SEARLS
*Attorney for Pacific Gas
and Electric Company*

Before the
FEDERAL POWER COMMISSION

In the Matter of
PACIFIC GAS AND ELECTRIC COMPANY

**Docket
No. E-6482**

**Motion of
Pacific Gas and Electric Company for
Reopening and Further Hearing**

Pacific Gas and Electric Company, hereinafter called PG&E, moves for reopening of this proceeding in accordance with the following:

1. On February 2, 1953, PG&E filed with the Commission its proposed rate schedule Supplement No. 1 to Schedule F.P.C. No. 3 for service to Sierra Pacific Power Company, hereinafter called Sierra. The charges specified in said Supplement No. 1 were higher than the charges provided in said rate schedule F.P.C. No. 3, which latter schedule was in the form of a contract between PG&E and Sierra.

2. The proposed effective date of said Supplement No. 1 was April 6, 1953. By order adopted March 13, 1953, the Commission suspended the proposed rates of Supplement No. 1 until September 6, 1953, and provided that said supplemental rate schedule should go into effect thereafter in

the manner prescribed by the Commission in accordance with the Federal Power Act. By the same order the Commission ordered a hearing concerning the lawfulness of the proposed rate.

3. By order adopted September 25, 1953 and issued September 28, 1953, the Commission declared that the proposed rates of said Supplement No. 1 had become effective as of September 6, 1953, subject to certain provisions of Section 205(e) of the Federal Power Act and made certain orders with respect to accounting and to refund in the event that any portion of the increased rates should be found not to be justified.

4. After hearings held in accordance with said order of March 13, 1953, the Commission, by Opinion No. 270 herein adopted June 16, 1954 and issued June 17, 1954, found that the proposed rate of said Supplement No. 1 was just, reasonable and lawful and, that "if a finding on the lawfulness of the 1948 contract rate were necessary or appropriate, on the record before us that finding would have to be that the 1948 rate is unreasonably low and therefore unlawful;" and in effect by order authorized PG&E to charge and collect from Sierra said proposed increase under Supplement No. 1 to Schedule F.P.C. No. 3.

5. On Sierra's petition to review the Commission's order in said Opinion No. 270, the United States Court of Appeals for the District of Columbia Circuit, on May 23, 1955, set aside the Commission's said order and remanded the case to the Commission with instructions to dismiss the proceeding without prejudice to the initiation of a new proceeding under Section 206(a) of the Federal Power Act.

6. On February 27, 1956, the Supreme Court of the United States on writs of certiorari to said Court of Appeals affirmed the decision setting aside the Commission's said order, but instructed that the case be remanded to the Commission for such further proceedings not inconsistent with the opinion of the Supreme Court as the Commission may deem desirable.

7. On March 30, 1956, PG&E sent its check to Sierra refunding the amount of \$382,022.37, which included \$336,821.53, the amount of the increase collected from September 6, 1953, the day it was placed in effect, to June 16, 1954, the date on which said Opinion No. 270 and the order therein contained were adopted by the Commission, plus \$45,200.84 representing interest thereon at 6% to the day of payment.

8. By motion filed April 16, 1956, Sierra requested the Supreme Court of the United States (1) to amend its instructions upon remand to limit further proceedings before the Commission to the determination of the lawfulness of the contract rate "at the time of such further proceedings" and the fixing of the rate "thereafter to be observed and in force," and (2) to declare that any amounts paid by Sierra in excess of the contract rates were unlawfully collected and that PG&E was obligated to make restitution of the excess payments. On May 28, 1956, the Supreme Court denied said motion without prejudice to the future determination of such rights as Sierra might have to restitution.

9. The opinion of the Supreme Court rendered February 27, 1956, which set aside the Commission's said order in Opinion No. 270, declared in effect that said order would be valid if supported by a finding that the contract rate ad-

versely affected the public interest by being so low that it might (1) impair the financial ability of the public utility to continue its service; (2) cast upon other customers an excess burden; or (3) be unduly discriminatory. Said opinion further declares that whether under the facts of this case the contract rate is so low as to have an adverse effect upon the public interest is a question to be determined in the first instance by the Commission, and that if the proceedings satisfied in substance the requirements of Section 206(a) it would be immaterial that the investigation was not begun under that section.

10. On June 1, 1956, the Supreme Court remanded this case with instructions for such further proceedings consistent with its opinion as the Commission deems desirable. By amplifying and supplementing its findings in accordance with said opinion of the Supreme Court, the Commission will protect the public interest, supply omissions arising from an erroneous view of the law, and make the determinations necessary to establish the right of Pacific to collect and retain the rate of said Supplement No. 1 from and after June 17, 1954.

11. The Commission is, therefore, requested to reopen this proceeding in order to make findings as to whether the rate of said Schedule F.P.C. No. 3 was on and prior to June 17, 1954, and thereafter, so low as to have an adverse effect upon the public interest and whether the rate of said Supplement No. 1 was not in excess of a just and reasonable rate for the service rendered on and after June 17, 1954.

12. Although the record now contains evidence sufficient to support a finding by the Commission that said rate Schedule F.P.C. No. 3 was so low as to have an adverse

effect upon the public interest, PG&E desires to present further evidence in support thereof showing that said rate was, prior to June 17, 1954, and ever since has been (1) so low as to impair the financial ability of PG&E to continue its service to Sierra; (2) so low as to cast upon other consumers an excessive burden; and (3) so low as to be unduly discriminatory. PG&E further desires to present evidence showing that the rate of said Supplement No. 1 was not in excess of a just and reasonable rate for the service rendered on and after June 17, 1954.

WHEREFORE, PG&E prays that this Commission reopen this proceeding to receive evidence, hear argument, and make findings material to the issues herein above set forth as raised by the said opinion of the Supreme Court of the United States and that a date be set for hearing thereon.

Dated this 8th day of June, 1956.

Respectfully submitted,

F. T. SEARLS

JOHN C. MORRISSEY

ROBERT E. MAY

Attorneys for

Pacific Gas and Electric Company

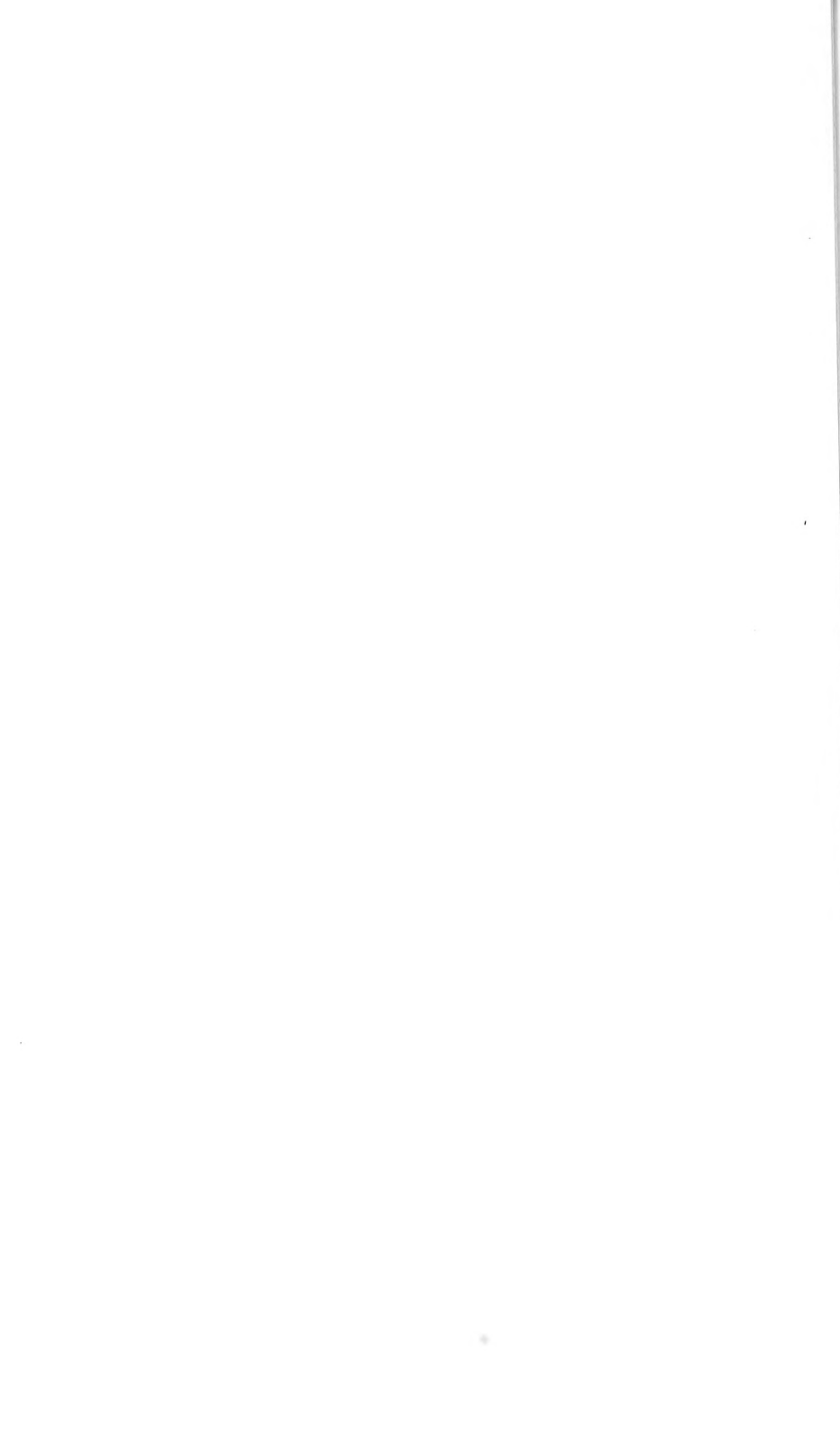


EXHIBIT C

1

October 1, 1957

Re: Pacific Gas and Electric Company
v. Federal Power Commission (Sierra
Pacific Power Company v. Pacific Gas
and Electric Company)

Paul P. O'Brien, Esq., Clerk
United States Court of Appeals
for the Ninth Circuit
Post Office Building
San Francisco 3, California

Dear Sir:

You will recall that on September 4, 1957, Mr. Malcolm T. Dungan of Brobeck, Phleger & Harrison wrote to you in connection with possible petitions for review and applications for stay by Pacific Gas and Electric Company regarding proceedings before the Federal Power Commission entitled and numbered *In Re Pacific Gas and Electric Company*, Docket No. E-6482, and *In Re Sierra Pacific Power Company*, Docket No. E-6697.

On Monday, September 23, 1957 in the course of the oral argument of certain motions in a separate action brought by Sierra Pacific Power Company against Pacific Gas and Electric Company in the United States District Court for the Northern District of California, Southern Division

(Civil No. 35591), counsel for Pacific Gas and Electric Company stated that his client intends to file in your Court a petition, under Section 313(b) of the Federal Power Act, for review of the Federal Power Commission's final order in proceedings above referred to. The last day on which such a petition could be filed is November 5, 1957.

As will necessarily appear on the face of any such petition for review that may be filed, the order to be reviewed was entered in response to a mandate issued by the United States Court of Appeals for the District of Columbia Circuit, in compliance with the decision of the Supreme Court of the United States in *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U. S. 348 (1956), affirming *Sierra Pacific Power Co. v. Federal Power Commission*, 223 F 2d 605 (D.C. Cir. 1955). The law seems well established that a petition to review such an order can only be filed in the court which issued the mandate. That court having taken jurisdiction of the controversy, no other Circuit Court would have jurisdiction to entertain the petition, despite the provisions of Section 313(b) of the Federal Power Act. *Morris v. Securities and Exchange Commission*, 116 F 2d 896 (2d Cir. 1941); cf. *Hicks v. National Labor Relations Board*, 100 F 2d 804 (4th Cir. 1939).

I am not clear whether this is the type of jurisdictional defect which, as it would appear on the face of the petition itself, would move your Court to dismiss the appeal *sua sponte*, or whether Sierra should make a motion to intervene and dismiss the appeal. In any event I would appreciate it very much if you would notify Messrs. Brobeck, Phleger & Harrison immediately if any attempt is made to file such a petition in your Court. I am sending a copy of

this letter to Mr. Searls, counsel for Pacific Gas and Electric Company, and to Mr. Wahrenbrock, Solicitor for the Federal Power Commission for their information.

Respectfully,

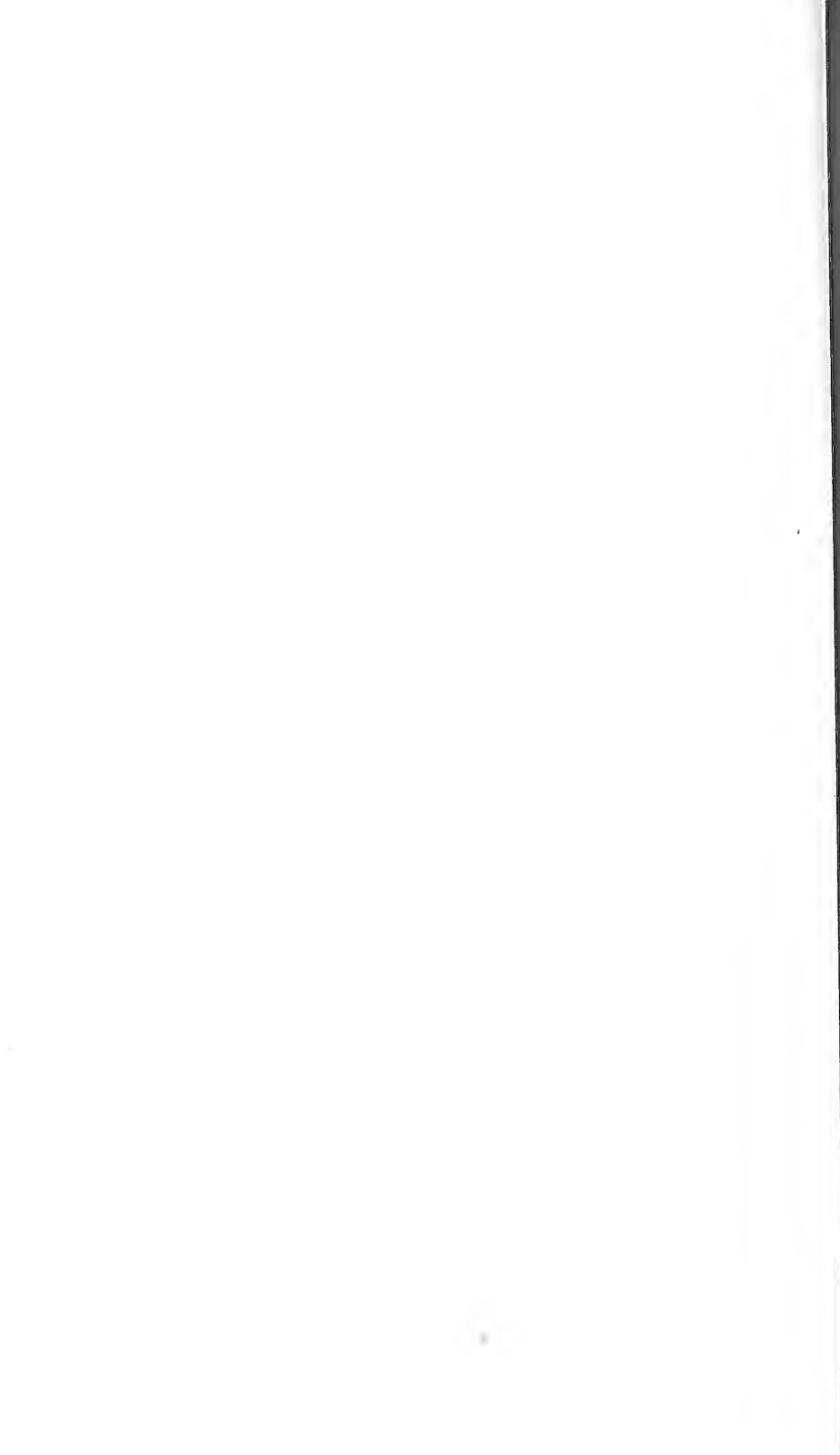
WILLIAM C. CHANLER
Of Counsel for
Sierra Pacific Power Company

cc. F. T. SEARLS, Esq.

HOWARD E. WAHRENBROCK, Esq.

GREGORY A. HARRISON, Esq.

BROBECK, PHLEGER & HARRISON



No. 15778. ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LYON FURNITURE MERCANTILE AGENCY,

Appellant,

vs.

IRENE M. CARRIER, doing business as WISHMAKER
HOUSE,

Appellee.

Upon Appeal From the United States District Court for the
Southern District of California, Central Division.

APPELLEE'S BRIEF.

DAVID G. LICHT,
9399 Wilshire Boulevard,
Beverly Hills, California,
Attorney for Appellee.

FILED

APR 25 1958

PAUL P. O'BRIEN, CLERK

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IN THE

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FOR THE NINTH CIRCUIT

LYON FURNITURE MERCANTILE AGENCY,

Appellant,

vs.

IRENE M. CARRIER, doing business as WISHMAKER
HOUSE,

Appellee.

Upon Appeal From the United States District Court for the
Southern District of California, Central Division.

APPELLEE'S BRIEF.

I.

Background information, as set forth in Appellant's statement of the case, is substantially true. The facts that give rise to the case, however, are not therein set forth. The Appellee, Mrs. Carrier, did take over the operation of the Carrier Furniture Company (later changed to Wishmaker House) on or about April 10, 1953. At that time, her husband left, never to return to the business. She found the business to be in a precarious position, owing some \$49,000.00 in accounts and finding little or no cash with which to pay the creditors. She immediately appealed to Mr. F. J. Hill, Manager of the Wholesale Credit Association of Arizona, for assistance, and together they

worked out a plan for the repayment of the debts, Mr. Hill at all times acting on behalf of the creditors.

During the ensuing months, Mrs. Carrier was able to pay a substantial amount to the creditors, in accordance with agreements with Mr. Hill, and all this information was at all times made available to Lyon, and was in fact a part of their record.

The Appellee's case is quite simple to state. Lyon Furniture Mercantile Agency, having undertaken to report its opinion of the financial condition of the Appellee's business, must have an affirmative duty to disseminate fairly the information which it has at its disposal and in its files. This was not done. On the contrary, for reasons unknown, the series of reports, which are in evidence, show what appear to be a deliberate injury to Mrs. Carrier in her business. The Appellee has no desire to examine, at this time, in a detailed way, the testimony of Mr. Byron M. Halfyard, the employee of Lyon who was charged with the duty of preparing the reports. But such a detailed examination would disclose such a careless disregard for the interests of Mrs. Carrier as to certainly imply malice. The first such example appears on page 146 of the transcript of the record. Mr. Halfyard was requested to explain what information he had used to report that Mrs. Carrier had no previous experience. Mr. Halfyard referred to the local credit agency in Phoenix that had sent a report to Lyon at the request of Halfyard. That report shows that Mrs. Carrier had been active in the business since 1946. Mr. Halfyard then states that his reference to the lack of experience of Mrs. Carrier referred to prior to 1946. The report issued by Lyon and prepared by Mr. Halfyard was in 1953. Apparently, seven years' experience was no previous experience to Mr.

Halfyard. He was later asked a series of questions with respect to the information contained in the Lyon file with respect to the various arrangements made by Mrs. Carrier for the payment of creditors. It will be apparent to the Court, from examination of his testimony in conjunction with the information contained in the various reports, which are exhibits, that each bit of information which might be considered favorable to Mrs. Carrier was omitted. Perhaps the most damaging item in the various reports was the statement contained in several of the reports [See Exs. 13, 14 and 15] that "Collection Record: During 1953 eight items of collection were placed with the Agency." Mr. Halfyard was asked [p. 178]: "Q. And do you ever mention in there whether or not the matters were paid or not? A. Never in a paragraph of that type." Mr. Halfyard was then shown a Lyon-Redbook report on a firm called "House of Enchantment," Tuscon, Arizona, April 1, 1955 (Arizona being Mr. Halfyard's territory), and Mr. Halfyard was asked to read [p. 179] from the paragraph in that report entitled "Collection Record." "A. Yes, sir. 'June 29, 1954 claim' so and so. Do you want the number? Q. No. A. (Continuing): \$186.75 placed in Los Angeles office for goods sold from March 3rd to March 17th, 1953, collected by Agency July 24, 1954."

The facts, then, are relatively simple. The Appellant had substantial information with which to prepare the report. The Court found, as it must, that Appellant was grossly negligent in reporting these facts, and that the Appellee was thereby damaged.

II.

Section 830 of the Code of Civil Procedure of the State of California Is Not Applicable to Actions in the United States District Court.

Under well-settled decisions (*Erie Railroad Co. v. Tompkins*, 304 U. S. 64), procedural matters are not restrictions on the United States District Court. This section is clearly procedural, since it could not possibly effect the substantive rights of either of the parties. And the precise question has been examined by this Court in the case of *Jefferson v. Stockholders Publishing Co.*, 194 F. 2d 281, in which the Court stated:

“This being an action for libel and no undertaking for the payment of costs having been filed with the Complaint, the Clerk appears to have assumed that compliance with Rule 4(a) (Fed. Rules of Civil Procedure), was precluded by Section 1 of Act 4317 of Deering’s General Laws of California (Code of Civil Procedure, Section 830). The assumption was incorrect. Section 1 relates to State Court actions, not to Federal Court actions. In Federal Courts, compliance with Rule 4(a) is required in all civil actions, including actions for libel.”

Appellant cites the case of *Kennley v. Superior Court*, 43 Cal. 2d 512, in support of *Keller Research Corp. v. Roquerre*, 99 Fed. Supp. 964. An examination of the *Kennley* case shows that the California Supreme Court held that the Judge in the *Keller* case erroneously applied Section 830 to cross-complaints. Needless to say, the California Supreme Court did not examine the question of the applicability of a procedural Code section to Federal procedure.

III.

The Findings Are Sufficient to Support the Judgment.

Appellant, in its paragraphs IV, V, VI, VII, VIII, IX and XI, attempts to have this Court reverse the case, not on the merits, but merely for its failure to make specific findings as to each of the detailed alleged defenses raised at the Trial Court.

The cases in this Court, as well as throughout the other Circuits, are myriad in their holdings that the Trial Court is not required to make findings on all of the facts presented, if the findings are sufficient to support the ultimate conclusions of the Court. (See *Oedekerck v. Muncie Gear Works, Inc.*, 179 F. 2d 821; *Norwich Union Indemnity Co. v. Haas*, 179 F. 2d 827; *Yanish v. Barber*, 232 F. 2d 939.) In addition, the failure of the Trial Court to make a specific finding on a particular issue does not constitute reversible error where the record clearly reveals the basis on which relief was granted, and additional findings are not necessary. (*Hines v. Perez*, 242 F. 2d 459.)

IV.

A. Mercantile Agency, Even Where Acting Under the Cloak of a Qualified Privilege, May Not Invoke That Privilege in a Grossly Negligent Manner.

In an examination of authorities throughout the United States, counsel for the Appellee has been able to find but one case precisely in point to the one at bar. That is the case of *Douglass v. Daisley*, 114 Fed. 628. In that case, as in this, the defendant, a mercantile reporting agency, falsely reported that the plaintiff had made an assignment for the benefit of creditors. He had, in fact, simply made an assignment to secure a loan. The Court discusses at length the question of the qualified privilege and the right

inherent in such privilege to report information that is, in fact, false. It is not argued therein, nor is the contention here made, that the information contained in a report which may be qualifiedly privileged, must necessarily be true. The very purpose of the qualified privilege is to allow firms engaged in that business to report to the various subscribers the information which they received, irrespective of its truth or falsity. And in the case of *Douglas v. Daisley, supra*, the Court states at page 633:

“The occasion being privileged, we do not think the general rule of law that liability results from accidental or inadvertent slander, and that the accident or inadvertence only operates to remove malice and limit the damages, applies to this case, and it is for the reason that the occasion was privileged, and the defendant was in the exercise of a right. It being a business right, however, or a private right, to gather and impart information to such members of the business world as were its subscribers, it must exercise the right reasonably, to the end that unnecessary harm shall not come to business men about whom the information is furnished. It is not a right which can be exercised heedlessly or carelessly. It is difficult to find a principle of law which would justify the careless or wanton exercise of a right of this character, and afford immunity on the ground of privilege. . . . Reasonable care and prudence with respect to forwarding information may, therefore, continue the privilege and clothe the acts of the agency with immunity, and, on the contrary, negligence may destroy the privilege and leave the parties responsible for acts which are culpable. Though the action is privileged, the privilege does not carry immunity to heedless and careless management in forwarding information.”

The substantive law of California is unquestionably the same, although the precise question has not previously been determined.

In 30 Cal. Jur. 2d 799, it is stated:

“A conditional privilege is lost, not only when the publication is motivated by hatred or ill will toward the plaintiff, but also when excessive language is used, defamatory matter is published for an improper purpose, or the defamation goes beyond the legitimate interest involved. Such privilege may give a person immunity for a publication which is actually false, but which, when he made it, he honestly believed to be true; but he is not given a license to overdraw, exaggerate, or color the facts.

The conditional privilege accorded to communications between interested persons is generally limited to communications made in good faith and honest belief in their truth. Knowledge of its falsity at the time of making it destroys the privileged character of such a communication, as does lack of probable cause for belief in its truth or of reasonable grounds for such belief. Whether a publication for which a conditional privilege is claimed was made maliciously and without reasonable or probable cause for believing it to be true is a question for the jury.”

See, also:

Snively v. Record Publishing Co., 185 Cal. 565,
198 Pac. 1.

The attention of the Court is respectfully directed to the case of *Brewer v. Second Baptist Church*, 32 Cal. 2d 791, 197 P. 2d 713. The Court stated:

“A privilege would exist in this case if the publication had been made without malice and the occasion

had not been abused. . . . For this conditional privilege extends to false statements of fact, although the occasion may be abused and the protection of the privilege lost, by the publisher's lack of belief, *or of reasonable grounds for belief, in the truth of the defamatory matter*, by excessive publication, by a publication of defamatory matter for an improper purpose, or if the defamation goes beyond the group interest. . . . Although there are situations where the protection of the interest involved may make it reasonable to report rumors or statements that the publisher may even know are false, *ordinarily the privilege is lost if the defendant has no reasonable grounds for believing his statements to be true.*" (Emphasis added.)

V.

The Damages Awarded by the Court Are Clearly Supported by the Evidence.

It is without question that the publication of one that he is unwilling or refuses to pay his debts, is libelous *per se*. (See *Neaton v. Lewis Apparel Stores*, 48 N. Y. S. 2d 492, 495.) The law presumes that damages follow from a publication that is defamatory *per se*, and under the circumstances damages will be awarded in a substantial amount. (*Smith v. Lyon*, 142 La. 975; *Jarmen v. Rea*, 137 Cal. 339.) In the case of *Wilson v. Fitch*, 41 Cal. 363, the California Supreme Court stated:

"The law implies that every libelous publication causes some damage to the injured party . . . and that it is the province of the Jury to estimate the amount."

The libelous statements issued by the Appellant are contained in four separate reports issued by them of the

financial condition of the Appellee during the years 1953, 1954 and 1955. From the evidence of the two manufacturer's representatives called by Appellee, Mr. Benet Frankel and Mr. Norman Davis, the rating contained in the book of "13-6" would in and of itself keep them from calling on an account; this, without even seeing the report, and in view of Mr. Halfyard's testimony that the proper rating would have been "13", rather than "13-6". These same gentlemen also testified that were they to find a "13" rating, they would make their own inquiries, and from that determine their course of conduct.

The Appellee testified that in one of the years just prior to the publication of the libel herein complained of, that the business then operated by her and her husband made a net profit in excess of \$19,000.00. She further testified that in her opinion, that in the absence of the several libels by the Appellant, that the business reasonably should have shown a net profit during the years 1953, 1954 and 1955 of approximately \$12,000.00 each. Where the defendant's wrongful act has made it difficult for the plaintiff to show, with reasonable certainty, the amount of his loss, the United States Supreme Court, in *Story Parchment Co. v. Patterson*, 282 U. S. 555, stated:

"Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all the relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such cases, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to com-

plain that they cannot be measured with the exactness and precision that would be possible if the case which he alone is responsible for making were otherwise. (Citing cases.) As the Supreme Court of Michigan has forcefully declared, the risk of the uncertainty should be thrown upon the wrongdoer instead of the injured parties.”

And see also *American Life Insurance Co. v. Shell*, 90 So. 2d 719, in which the verdict for \$34,360.00 in a libel action was sustained, and wherein the above quote from the *Story Parchment Co.* case was cited in support thereof.

Respectfully submitted,

DAVID G. LICHT,

Attorney for Appellee.

No. 15778

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LYON FURNITURE MERCANTILE AGENCY,

Appellant,

vs.

IRENE M. CARRIER, doing business as WISHMAKER
HOUSE,

Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

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No. 15778
IN THE
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LYON FURNITURE MERCANTILE AGENCY,

Appellant,

vs.

IRENE M. CARRIER, doing business as WISHMAKER
HOUSE,

Appellee.

**Appeal From the United States District Court for the
Southern District of California, Central Division.**

APPELLANT'S OPENING BRIEF.

This is an appeal from a final judgment of the United States District Court for the Southern District of California, Central Division, in an action brought by the plaintiff, a resident of the State of Arizona, against the defendant, a resident of the State of New York.

I.
Jurisdiction.

Jurisdiction is vested in this Court by authority of 28 U. S. C. A., Section 1332, subdivision a and a(1) thereof as being between the parties of diverse citizenship, to wit, a citizen of the State of Arizona and a citizen of the State of New York, and because the matter in controversy

exceeds the sum of \$3,000.00 exclusive of interest and costs, and under 28 U. S. C. A., Section 1291 thereof under which "The Courts of Appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States", the final judgment in this case being set forth in the Transcript of Record commencing on page 29 thereof.

II.

Statement of Case.

The Appellee in this case is Irene M. Carrier who, under the name Wishmaker House, conducted a retail store for the sale of furniture and appliances in the City of Phoenix, Arizona [Tr. of R. p. 46]. From 1948 to 1953 she worked in this store with her husband in various capacities [Tr. of R. p. 57], the store being known as Carrier's Furniture until January 1954 [Tr. of R. p. 57].

On April 10, 1953 or thereabout her husband went on a cruise apparently for his health [Tr. of R. p. 58] and as the Reporter's Transcript of her testimony shows, he did not return at any time to operate the business and plaintiff (Appellee) operated the business from and after said date of about April 10, 1953, to the date of the filing of the complaint herein in 1955.

That at the time her husband went on this trip there was \$49,000.00 in outstanding liabilities, the great majority of which were from sixty to ninety days old [Tr. of R. p. 47] and was owing to at least sixty different creditors [Tr. of R. p. 61, also p. 100; Pltf. Exs. 1 and 2], and that she had assets of \$70,000.00 [Tr. of R. pp. 84 and 85]. That on the day following Mr. Carrier's leaving a creditor, Arizona Hardware Company, called

upon the plaintiff (Appellee) and she told him that she felt that she was in a mess; also that Phoenix being small, the news got around very quickly that Mr. Carrier had gone on a cruise [Tr. of R. pp. 59 and 60]. That as a result of the call of the creditor, Arizona Hardware Company, she caused a financial statement and list of her creditors to be prepared [Tr. of R. p. 60] and took this statement to the Manager of Arizona Hardware Company and plaintiff (Appellee) herself suggested that she would go on a C.O.D. basis as one of the methods for solving her credit problem [Tr. of R. p. 61]. She then went to another creditor, General Electric Supply, talked to its Credit Manager, a Mr. J. Paxton, and stated to him that she would go on a C.O.D. basis and worked out a type of arrangement for payment of her indebtedness [Tr. of R. p. 62].

Plaintiff (Appellee) then proceeded to run sales to raise money for her creditors, as she stated her business was very poor, running sales at the end of April (1953) and a big sale in early June (1953) using the money to pay her creditors and placing \$6,000.00 resulting from the sales with a Mr. Hill of Phoenix, who was the head of Phoenix Credit Men's Association. Three creditor's meeting were called in the month of June (1953) [Tr. of R. pp. 63 and 99], but after the creditors meetings the plaintiff (Appellee) conducted her business as best she could and made payments as best she could, and in November 1953 she entered into a written agreement with her creditors to pay them on their indebtedness \$1,000.00 per month, but was only able to do so for three months [Tr. of R. p. 67]. All of this was done under the supervision of Mr. F. J. Hill, Manager of Wholesale Credit Association of Arizona (which is the

same as Phoenix Credit Men's Association mentioned above). [Testimony of Mr. Hill, Tr. of R. pp. 98 to 117].

On December 29, 1953, some nine months after plaintiff's (Appellee) husband had left her alone to run the business in the financial condition set forth in the foregoing statement of facts and after the calling of the various creditors' meetings and the drawing of the Amortization Agreement and the intervention of the Wholesale Credit Association of Arizona to aid plaintiff (Appellee) in the financial predicament in which she was left by her husband, the defendant Lyon Furniture Mercantile Agency (Appellant herein) issued the first of several reports to several of its subscribers complained of by plaintiff (Appellee) in her amended complaint and oral amendment to amended complaint [Pltf. Exs. 8, 10, 11, 12 and 15 and Tr. of R. pp. 245 and 246].

That the Appellee never did pay the \$49,000.00 indebtedness in full but got it down to \$9,700.00 by the end of January 1955 and then settled this \$9,700.00 indebtedness for \$3,000.00 [Tr. of R. p. 78].

The Appellant herein, Lyon Furniture Mercantile Agency, at all times complained of and since 1876 was and is a Credit Reporting Agency supplying its services to Credit Managers of manufacturers, wholesalers and jobbers in the home furnishing industry [Tr. of R. pp. 241-242]. It had eight offices from coast to coast, issued over one hundred thousand reports annually and published semi-annually a credit reference book in which is listed over one hundred and thirty thousand firms in this industry [Tr. of R. p. 242], its reports being issued only to subscribers under a contract and who requested reports in writing [Tr. of R. p. 242].

That of eight concerns named by the plaintiff (Appellee) in her amended complaint as having received the reports complained of by stipulation entered into in Open Court, it was stipulated that all of them with the exception of one were subscribers by contract to Lyon Furniture Mercantile Agency (Appellant herein), and received reports at their specific request from Lyon Furniture Mercantile Agency under the terms of their contract [Tr. of R. p. 204].

In her amended complaint [Tr. of R. p. 8] Paragraph IV, plaintiff (Appellee) charged that the reports issued by defendant (Appellant) Lyon Furniture Mercantile Agency were absolutely false in the following particulars:

- a. That by innuendo the reports impute to plaintiff the securing of said business by coercion and duress;
- b. That the reports stated that plaintiff had no previous retail furniture experience;
- c. That plaintiff employed a manager to operate said business;
- d. That 1954 payments were slow;
- e. That the bulk of plaintiff's purchases are being made on a C.O.D. basis.

Plaintiff (Appellee) further alleged in her amended complaint [Tr. of R. p. 9] Paragraph VI thereof, that the reports were wilfully and maliciously made, knowing them to be false when made and for the express purpose of destroying the plaintiff's (Appellee) credit and financial standing and of ruining her business, by reason of which she contended that she had suffered damages in the sum of \$25,000.00 [Tr. of R. p. 9, Par. VIII of amended complaint].

The defendant (Appellant) in its answer denied all of the material allegations of the plaintiff's (Appellee) amended complaint, and as affirmative defenses alleged [Tr. of R. pp. 23 and 24] that it was a Credit Agency furnishing credit information to its subscribers upon subscribers requests therefor; that such reports as were issued by them were delivered in good faith and without malice on a privileged occasion and as a privileged communication to interested subscribers, and that they had reasonable cause to believe and did believe that the matters set forth in said reports were true.

That prior to the actual trial of the matter defendant (Appellant) made a timely motion to dismiss plaintiff's (Appellee) complaint upon the ground that the plaintiff (Appellee) had failed to file the undertaking in the sum of \$500.00 as required by Section 830 of the Code of Civil Procedure of the State of California in actions for libel and slander [Tr. of R. p. 4], which said motion was denied [Tr. of R. p. 18].

III.

Specifications of Error Relied On.

In Appellant's statement or designation of points on appeal [Tr. of R. pp. 277 to 280 incl.] are set forth generally the specifications of errors relied on, but which are now specifically set forth as follows:

1. The Court below erred in not granting the Appellant's timely motion requiring the Appellee to file an undertaking as a condition precedent to the maintenance of this action for damages for libel.

2. The Court below erred in not granting the Appellant's motion for a dismissal at the conclusion of the Appellee's evidence.

3. The Court below erred in failing to find that the credit reports complained of and set forth in Appellee's amended complaint were privileged as a matter of law and as provided by Section 47, Subdivision 3, of the Civil Code of the State of California, and likewise failing to find that they were factually and substantially true, and also failing to find that they were made without malice in that malice was not inferred, as is clearly set forth in Section 48 of the Civil Code of the State of California.

4. The Court below erred in failing to find that the Appellants is and was at all times a National Credit Agency engaged in the business of issuing credit reports in the furniture industry to members or subscribers of said Agency.

5. The Court below erred as a matter of fact in failing to find that the Appellee did not suffer any damages by reason of the issuance of the credit reports complained of based upon any testimony given at the trial.

6. The Court below erred in failing to find that as a matter of law the Appellee could not recover any damages in the absence of a specific finding that the reports complained of in Appellee's amended complaint were not privileged or if privileged that they were actuated by malice.

7. The Court below erred in failing to find on material allegations both in Appellee's amended complaint and in Appellant's answer in the following respects:

a. The Court below failed to find and there is no finding with respect to the allegations set forth in Paragraph IV of Appellee's amended complaint.

b. The Court below failed to find and there is no finding with respect to the allegations set forth in Paragraph VI of Appellee's amended complaint.

c. The Court below has failed to find and there is no finding with respect to the allegations set forth in Paragraph IX of the Appellee's amended complaint.

d. The Court below has failed to find and there is no finding with respect to the allegations set forth in Appellant's first and second affirmative defenses.

e. The Court below has failed to find and there is no finding with respect to the allegations that the communications complained of were privileged and were published without malice.

8. The Court below erred in finding that the Appellant was "grossly negligent in its conduct", as found in Paragraph V of Appellee's Findings of Fact on file herein.

In submitting to this Court points and authorities to substantiate Appellant's contentions as outlined above that the Honorable District Court erred in each of the specifications of error set forth above, this Court's attention is respectfully called to the fact that the substantive law of the State of California (the place of trial) on the law of libel, on damages and evidence must guide this Court in the determination of this appeal and in determining whether or not the District Court erred.

Erie Railroad Co. v. Tompkins, 304 U. S. 64;
Anderson v. Hearst, 120 F. 2d 850;
35 C. J. S., p. 1236, etc.

IV.

The Court Below Erred in Not Granting the Appellant's Timely Motion Requiring the Appellee to File an Undertaking as a Condition Precedent to the Maintenance of This Action for Damages for Libel.

Section 830 of the Code of Civil Procedure of the State of California under the authority of which the motion to file an undertaking as a condition precedent to the maintenance of an action for libel, reads as follows:

“Before issuing the summons in an action for libel or slander, the clerk shall require a written undertaking on the part of the plaintiff in the sum of five hundred dollars (\$500), with at least two competent and sufficient sureties, specifying their occupations and residences, to the effect that if the action is dismissed or the defendant recovers judgment they will pay the costs and charges awarded against the plaintiff by judgment, in the progress of the action, or on an appeal, not exceeding the sum specified. *An action brought without filing the required undertaking shall be dismissed.*”*

Libel as this Court well knows and as is defined by Section 45 of the Civil Code of the State of California, is defined as follows:

“Libel is a *false* and *unprivileged* publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.”

*In all instances in this brief italics do not appear in the citations, but are used by counsel to emphasize the same.

Inasmuch as the substantive law of the State where the case is tried governs the trial of the case (*Erie Railroad Co. v. Tompkins, supra*) it is for this Court to determine whether Section 830 of the Code of Civil Procedure as quoted above is substantive or procedural only and governs in civil actions filed in the Federal Courts between citizens of diverse States. Even though the requirement for the filing of a bond as a condition precedent to the issuance of a summons in an action for libel or slander is found in the State Code of Civil Procedure it is respectfully urged and suggested that it is still a part of the substantive law of the State of California and therefore should govern and control the District Court in any District in the State of California on the question of the filing of the requisite bond.

In a case passed on by the District Court of the Southern District of California by the Honorable Pierson M. Hall, District Judge, *Keller Research Corp. v. Roquerre*, 99 Fed. Supp. 964 (decided September 11, 1951) the District Judge ordered the filing of a bond within five days as a condition to proceeding with a cause of action on a cross-complaint for libel. The defendant in that case (cross-complainant) contended that the California Act (Sec. 830, C. C. P.) was not applicable as the Federal Rules of Civil Procedure 28 U. S. C. A. contained no such provision for a bond and must prevail over any special act of the State of California. With reference to that contention the Honorable District Judge Hall referred to the case of *Cohen v. Beneficial Loan Corp.*, 337 U. S. 541, point 4 on page 542, wherein the Court stated:

“A Federal Court having jurisdiction of a stockholders derivative action, only because of *diversity*

of citizenship must apply a statute of the forum State which makes the plaintiff, if unsuccessful, liable for reasonable expenses including attorney's fees of the defense and provides that the corporation may require the plaintiff to give security for their payment as a condition of prosecuting the action."

The Supreme Court of the State of California in the case of *Kennaley v. Superior Court*, 43 Cal. 2d, page 512 on page 516, by inference in the opinion of counsel, upheld the necessity of the filing of a cost bond in the Federal Court as a condition precedent to maintaining a libel action as provided by Section 830 of the Code of Civil Procedure by referring to the case of *Keller Research Corp. v. Roquerre, supra*, on which the petitioner in the State Court case was relying in his motion to require the filing of a cost bond under a cross-complaint, the Supreme Court of the State of California saying in referring to the *Keller v. Roquerre* case *supra*:

"The Federal Court there, assumed, without discussing the provisions of Section 830, that the Section applies to a cross-complaint. Section 830 does not admit of that assumption."

It would appear to counsel for the Appellant that from the foregoing the motion to require the filing of a bond should have been granted with the condition that if said bond were not filed within five days that the action should be dismissed.

It is the belief of counsel for the Appellant that a definite ruling on the point should be made by this Court for the future guidance of the Courts, litigants and counsel in future similar matters. It is believed in order to suggest that this Court should first determine whether

Section 830 of the Code of Civil Procedure of the State of California is a part of the substantive law as well as the procedural law, and further, to definitely rule whether or not in actions for libel or slander filed in the Federal Courts that the plaintiff should be required to file the bond provided for by said Section 830 of the Code of Civil Procedure before issuing summons. It is respectfully urged that the motion in this case should have been granted and that the refusal to do so constitutes reversible error.

V.

The Court Below Erred in Not Granting the Appellant's Motion for a Dismissal at the Conclusion of the Appellee's Evidence.

At the conclusion of the Appellee's case [Tr. of R. pp. 247 and 248] counsel for the defendant (Appellant) moved that the plaintiff's (Appellee) complaint be dismissed and that judgment be entered for the defendant (Appellant). It is respectfully contended that the motion should have been granted in that the evidence as reflected by the transcript of plaintiff's (Appellee) case [Tr. of R. pp. 44 to 247, incl.] failed to show that the reports complained of and published by the defendant (Appellant) were false, that they were actuated by malice, that they were unprivileged and that plaintiff (Appellee) was damaged by such reports.

All of the foregoing points were made in the motion and the argument on the motion [Tr. of R. pp. 247 to 258, incl.] and cases submitted in the argument in support of defendant's (Appellant) contentions that plaintiff's (Appellee) case should be dismissed.

There is set forth hereafter under this subhead the pertinent testimony and facts which the Trial Court had before it at the conclusion of the case, which counsel for Appellant respectfully suggests is more than sufficient to show that the plaintiff (Appellee) had failed to make out even a *prima facie* case or any case of libel.

On pages 258 and 259 of the transcript of record, counsel for the plaintiff (Appellee) in response to the motion to dismiss, made the following statements:

“I find myself in a strange position of agreeing with many of the points made by the attorney for the defendant.

I agree that there were many truthful statements made in these reports and I agree that *Mr. Halfyard or any of the partners were certainly not activated by malice at the time they made their reports, since it appears quite obvious that they didn't even know her.*

And I also agree that this is their job to report, this is the business they have undertaken.

At the time Mrs. Carrier took over this business. it was admittedly in a poor condition . . . Then she had substantial indebtedness . . . Our case isn't that this man was going to try to fix Mrs. Carrier. He didn't even know Mrs. Carrier, and neither did any of the other parties to this.”

It is also deemed pertinent to ask this Court to refer to counsel for the plaintiff's (Appellee) opening statement to the Court as it appears on pages 46 to 53, inclusive, of the transcript of record, from which statement it will be apparent that the plaintiff (Appellee) was in a “financial mess” long prior to any reports issued by the defendant (Appellant), and also that the defendant (Appellant) was a

Credit Agency issuing credit reports to its subscribers with reference to retailers engaged in the furniture business.

That the defendant (Appellant) was a Mercantile Credit Agency issuing reports on credit and financial standings and was not actuated by malice and whose reports were qualifiedly privileged under Section 47, Subdivision 3 of the Civil Code of the State of California, was abundantly evident to the Court in the testimony of John J. Sigerson and other witnesses as will be hereinafter referred to. Section 47, Subdivision 3 of the Civil Code of the State of California reads as follows:

“A Privileged Publication or Broadcast is one made—

3. In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent or (3) who is requested by the person interested to give the information.”

At this point it is also well for the Court to have before it Section 48 of the Civil Code, which reads as follows:

“In the case provided for in subdivision 3 of the preceding section, malice is not inferred from the communication.”

It is also in order for the Court to have before it Section 45A of the Civil Code and Section 48A, subdivision 4(b) and (d), which read as follows:

45A Civil Code:

“A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be

a libel on its face. *Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof. Special damage is defined in Section 48A of this Code.*"

Section 48A, subdivision 4(b):

" 'Special Damages' are all damages which plaintiff *alleges and proves* that he has suffered in respect to his property, business, trade, profession or occupation including such amounts of money as the plaintiff *alleges and proves* he has expended as a result of the alleged libel, *and no other*;

- (d) " 'Actual Malice' is that state of mind arising from hatred or ill will toward the plaintiff; provided, however, that such a state of mind occasioned by a *good faith belief* on the *part of the defendant* and in the *truth* of the libelous publication or broadcast at the time it is published or broadcast *shall not constitute actual malice.*"*

Mr. Sigerson, a witness produced by the plaintiff (Appellee) and whose testimony appears starting on page 239 of the Transcript of Record, testified as follows:

"Q. (By Mr. Licht) What is your occupation, Mr. Sigerson?

A. General Manager of the Lyon Furniture Mercantile Agency.

Q. And your office is in New York, is that correct?

A. The executive office is in New York.

*The italics used herein do not appear in the text of the Code definitions but are used by counsel for emphasis.

Q. And are you also a partner in this firm?

A. I am.

* * * * *

Cross-Examination.

Q. (By Mr. W. E. Catlin) Mr. Sigerson, I believe you stated you are the General Manager of the Lyon Agency?

A. That is correct.

Q. Do you know when the Lyon Agency was organized?

A. Yes it was founded in 1876.

Q. How many offices does it have in your organization?

A. Presently from coast to coast, eight offices.

Q. What is the type of business carried on by the Lyon Furniture Mercantile Agency?

A. The Lyon Furniture Mercantile Agency is a credit reporting agency supplying the mercantile agency service to the credit managers of manufacturers, wholesalers and jobbers in what might be termed the home furnishing industry.

Q. Mr. Sigerson we have here that has been exhibited several times a credit reference book of the Lyon Furniture Mercantile Agency. Is this a publication by the Agency?

A. That is published semi annually by the Agency and has been since 1876.

Q. Do you have any idea how many firms are listed in this publication?

A. Roughly over 130,000.

Q. Do you have any idea how many reports are issued by the organization per year?

A. I would say over a hundred thousand.

Q. To whom are reports issued by the Lyon Furniture Mercantile Agency?

A. Only to subscribers under contract who have written in requesting the reports.

Q. In other words, Mr. Sigerson, before a person can obtain the services of the reporting section of the Lyon Agency, they must enter into a contract with you?

A. Into a written contract.

Q. And this contract defines the rights and the circumstances under which a report will be granted, is that correct?

A. That is correct.

Q. Now Mr. Sigerson, is it true that these reports are only issued at the specific request of a subscriber?

A. That is correct.

Q. Mr. Sigerson, are you personally acquainted with Mrs. Irene Carrier?

A. Yes.

Q. Would you tell the court when you became acquainted with her?

A. I met her at her place of business on Memorial Day, May 30, 1955-'56, please.

* * * * *

Q. This was the only time in your life prior to this trial that you met her?

A. The only time I ever met Mrs. Carrier.

Q. Now had her name ever come to your attention as an individual prior to the filing of this action?

A. I never heard of Mrs. Carrier prior to that.

Q. Did you have any ill will or malice toward her personally?

A. None whatever.

* * * * *

On page 221 of the Transcript of Record there appears the following testimony on behalf of the plaintiff (Appellee):

“Q. Now Mr. Halfyard, did you have any personal animosity toward Mrs. Carrier?

A. Of course not. Not the least. I didn't know the lady any more than by name.

Q. Did you have any knowledge of her except through the information contained in your folder?

A. No, none whatsoever.

Q. Mr. Halfyard at the time you wrote the 1953, '54 and '55 reports, did you believe all the information you put into the reports that you created to be true?

A. I did.”

From the testimony of Mrs. Irene Carrier on the question of her knowledge that the defendant (Appellant) was a credit agency and on the question of malice we quote her testimony as follows starting at page 87 of Reporter's Transcript:

“Q. (By Mr. W. E. Catlin) Do you know, Mrs. Carrier, the type of business the Lyon Furniture Mercantile Agency is engaged in, of your own knowledge?

A. Yes. It's credit.

Q. Credit. By that you mean they write credit reports?

A. They are a credit reporting agency, as far as I know, and a collection agency.

Q. It is a credit reporting agency?

A. And a collection agency.

Q. And are you at all familiar in your dealings as a retail furniture business-woman with the methods in which they operate? By this I specifically mean that they have subscribers to their business?

A. I know you have subscribers.

Q. And do you also know of your own knowledge that to get a report from the Lyon Company you must be a subscriber to their services?

A. That is what I am told."

And on the question of malice as testified to by Mrs. Carrier after much sparring around she testified as follows, page 93 of the Transcript of Record:

"Q. All right beyond these three people, one that you can't identify, one identified as Mr. Abernathy and one identified as Mr. Sigerson, you have never had any contact with any other member of the Lyon Company?

A. No, sir, I have not.

Q. Now Mrs. Carrier, would you tell me which of these three, if any, have ill will against you?

A. I don't think personally, if you want to break them down individually, that they have ill will towards me. I think as an organization you are doing the wrong thing and printing the wrong thing I have to judge you by what you do, not by what you say."

If the Court will take into consideration all of the foregoing it becomes apparent at once that the defendant (Appellant) is a Mercantile Credit Agency and that its reports are qualifiedly privileged under Section 47, subdivision 3 of the Civil Code of the State of California, that it affirmatively appears that it had no malice notwithstanding the fact that under Section 48 of the Civil Code malice is not inferred or presumed as to a qualifiedly privileged communication, and as a matter of law the plaintiff (Appellee) must allege and prove malice in order to make out a case, which it certainly failed to do in this case.

In the event the evidence discloses a case of qualified privilege, malice is not presumed; and in order to state a cause of action the plaintiff must allege and prove malice.

Locke v. Mitchell, 7 Cal. 2d 999.

It is a general rule that a Mercantile Agency's credit reports to interested subscribers is qualifiedly privileged. In the case of *Cullum Motor Sales v. Dun & Bradstreet*, found in 90 Southeastern Reporter 2nd at page 370 (which is a case of the Supreme Court of the State of South Carolina decided December 6, 1956) the Court said:

"The defense of qualified privilege is available to a mercantile agency in respect to reports on credit and financial standing of an individual or business concern communicated confidentially, and in good faith, to a subscriber having an interest in the particular matter. Report by a mercantile agency to a subscriber who had requested information concerning financial condition of an automobile dealer was qualifiedly privileged, and although false, was not actionable in the absence of malice."

To the same effect as the foregoing is the case of *Watwood v. Stone's Mercantile Agency, Inc.*, 194 F. 2d 160 (certiorari denied, 344 U. S. 821).

To the same effect that malice is not inferred from the communication in addition to the Civil Code, Section 48, *supra*, is the case of *Davis v. Hearst*, 160 Cal. 143 at page 164, and the case of *Miles v. Rosenthal*, 90 Cal. App. 390.

Nowhere in the transcript of the testimony of plaintiff (Appellee) and all the witnesses called by her [Tr. of R. pp. 53 to 247] is there any testimony of any actual or even implied malice, nor any testimony that the defendant (Appellant) was not a Mercantile Agency and/or that

its reports were not qualifiedly privileged, or that she suffered any special damages, but quite to the contrary all of the testimony as set forth and referred to herein-above affirmatively shows that there was no malice and that the reports complained of were qualifiedly privileged.

In addition to the cases cited above there are many other cases such as *Freeman v. Mills*, 97 Cal. App. 2d 161, and *Snively v. Record Publishing*, 185 Cal. 565, which hold that even though a statement may be defamatory and false (of which there is no proof of any kind by the Appellee in this case) it is privileged if it is published without malice, and if it affirmatively appears that a communication was privileged (which is the fact in this case) in order to make out a *prima facie* case the plaintiff must *allege* and *prove* the existence of malice.

In the case of *Brewer v. Second Baptist Church of Los Angeles*, 32 Cal. 2d page 791, a general statement of law is made as follows:

“Malice destroying a privilege may not be inferred from the fact alone of the communication of the defamatory statement.”

In the case of *Emde v. San Joaquin County Central Labor Council*, found in 23 Cal. 2d at page 146, is the following statement of law:

“Where publication is conditionally privileged no right of action arises because publication is false unless publishers were actuated by malice, and malice is not inferred from the publication.”

It is respectfully submitted that in the consideration of all of the foregoing, and resolving every inference in favor of the plaintiff, as the Court must do in considering a motion for a dismissal at the conclusion of a plain-

tiff's case, that based upon the evidence submitted by the plaintiff and based upon the law applicable to the facts, the District Court erred in denying the motion for a dismissal at the conclusion of the plaintiff's (Appellee) evidence.

VI.

The Court Below Erred in Failing to Find That the Credit Reports Complained of and Set Forth in Appellee's Amended Complaint Were Privileged as a Matter of Law and as Provided by Section 47, Subdivision 3 of the Civil Code of the State of California, and Likewise Failing to Find That They Were Factually and Substantially True, and Also Failing to Find That They Were Made Without Malice in That Malice Was Not Inferred, as Is Clearly Set Forth in Section 48 of the Civil Code of the State of California.

Rule 52 of the Federal Rules of Civil Procedure, which are entitled "Findings By The Court" require "in all actions tried upon the facts without a jury or with an advisory jury the Court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment."

It is unquestionably the law of the State of California that the failure of a Court to find upon a material issue is reversible error, and the Court's attention is respectfully called to only one or two late cases re-expressing and reaffirming the foregoing statement of law.

In the matter of *Renfer v. Skaggs*, 96 Cal. App. 2d, at page 383 our Appellate Court said:

"If the court fails to find on material issues made by the pleadings—issues as to which a finding would have the effect to countervail or destroy the effect of

the other findings—and as to which evidence was introduced, the decision is ‘against law.’”

In the case of *San Jose etc. Title Insurance Co. v. Elliott*, 108 Cal. App. 2d, at page 801, the Court said:

“It has been repeatedly affirmed that where a court renders a judgment without making findings upon all material issues of fact, the decision is against law, and constitutes ground . . . for reversal upon appeal, provided it appears that there was evidence introduced as to such issue and the evidence was sufficient to sustain a finding in favor of the party complaining.” Citing innumerable cases in support of this point.

“This rule applies to issues raised by the answer as affirmative defenses and to issues raised in cross complaints.”

The plaintiff’s (Appellee) amended complaint in Paragraph VI thereof [Tr. of R. p. 9] alleges:

“That the defendant wilfully and maliciously made the aforesaid reports and delivered them to the aforementioned persons and its subscribers knowing the same to be false when it made them, for the express and sole purpose of destroying the plaintiff’s credit and financial standing and of ruining her business.”

The Finding with reference to said Paragraph VI is Finding Number V [Tr. of R. p. 28] and reads as follows:

“That the defendant, acting by and through its duly authorized agents and servants *was grossly negligent* in the preparation of the aforesaid reports in that then and there there was in its possession information showing a substantially more favorable condition of

plaintiff's business and of plaintiff's financial condition than was reported. The defendant *was grossly negligent* in the interpretation of the financial condition of the plaintiff as disclosed by the aforesaid statements and information then and there available to defendant."

It is respectfully suggested that the Finding Number V above is in no way a Finding that the defendant acted "wilfully and maliciously" as is alleged in Paragraph VI of plaintiff's (Appellee) amended complaint set forth above. Quite to the contrary, the case of *Davis v. Hearst*, 160 Cal. 143 at pages 167, 172 and 173 states:

"But the truth is that mere negligence or mere carelessness *can never be evidence of malice in fact*. In the same act they cannot even co-exist. Malice necessarily imports an evil purpose. *Negligence necessarily implies an absence of intent or purpose*.

Mere inadvertence or forgetfulness or careless blundering is not evidence of malice, nor is negligence or want of sound discretion nor the mere fact that the statement is not true."

It is therefore respectfully urged that the Finding Number V above is not a Finding of wilfullness and maliciousness as alleged in Paragraph VI quoted above of plaintiff's (Appellee) amended complaint, and it must be proved and found in order for the plaintiff (Appellee) to prevail, and that under the authority of Rule 52 of the Federal Rules of Procedure and the California cases cited above in this specification of error, the Court has failed to find malice and/or wilfullness a material issue in this case and for this reason the judgment of the Lower Court should be reversed.

VII.

The Court Erred in Failing to Find That the Appellant Is and Was at All Times a National Credit Agency Engaged in the Business of Issuing Credit Reports in the Furniture Industry to Members or Subscribers of Said Agency.

The defendant (Appellant) in its affirmative defenses set forth on pages 22, 23 and 24 of the Transcript of Record, alleges that it was in the business of a Mercantile Agency by compiling and furnishing to its subscribers on request information of the history, standing and condition of merchants, traders and others engaged in business within the limits of the United States, or elsewhere, or in other words, a National Credit Agency. The proof of that fact is hereinabove set forth by competent affirmative evidence introduced by the plaintiff (Appellee) herself when she called the witness John J. Sigerson, whose testimony is quoted verbatim above and is uncontradicted, and is nowhere contradicted. It is a material issue, and under the authority of *Title Insurance Co. v. Elliott*, *supra*, and other California cases, as well as Federal Rules of Civil Procedure, Rule 52, it is reversible error to fail to find on the issue raised by the answer as an affirmative defense. The Findings in this matter are silent on that affirmative defense and there is no Finding, and the failure to make a Finding is, it is respectfully submitted, under the authorities, reversible error.

VIII.

The Court Erred as a Matter of Fact in Failing to Find That the Appellee Did Not Suffer Any Damages by Reason of the Issuance of the Credit Reports Complained of Based Upon Any Testimony Given at the Trial.

In the opening statement made by Appellee's counsel appearing on page 52 of the Transcript of Record, Appellee's counsel said:

"Now, on the question of damage, your Honor, I am aware we are in a field most difficult to determine.

We will have some evidence of the earnings of the business before this first report was brought out on Mrs. Carrier, and I am aware that there have been substantial changes in the business.

I am also aware that we are in a field which clearly borders on the speculative."

Section 3301 of the Civil Code of the State of California reads as follows:

"Damages must be certain. No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin."

Generally remote, uncertain and speculative damages are not recoverable.

Julian Petroleum Corp. v. Courtney Petroleum Co.,
22 F. 2d 360.

Damages which are purely speculative, fanciful and imaginary cannot be recovered. . . .

Williams v. Krumsiek, 109 Cal. App. 2d, p. 456.

Damages to health, reputation, or feelings are not clearly ascertainable in nature or origin, and damages for remote causes and effects cannot be recovered.

McGregor v. Wright, 117 Cal. App. 186.

Nowhere in the transcript of the testimony is there any affirmative testimony to show that the plaintiff (Appellee) was damaged in any respect by the issuance of the reports by the Appellant. An attempt was made by counsel for the Appellee to introduce some testimony as to the matter of damages, and the Court's attention is respectfully called to such testimony appearing in the Transcript of Record at page 244 and reading as follows:

"Q. (By Mr. Licht): Now Mrs. Carrier, you recall that yesterday I had asked you some questions with respect to the damage which you alleged in your claim. Do you have at this time any way of more specifically fixing the damages than at that time; have you made any calculations?

A. Yes. May I have my purse, please? Thank you.

(The Witness removes paper from envelope.) I made a list here of moneys thrown into that business.

Mr. Catlin: I can't hear you.

Mr. Licht: Would you speak louder, please.

A. I made a list of approximate moneys put into that business in order to keep it open. It was done by refinancing and mortgage on the building, most of it.

Q. And how much *additional capital* did you put in because of that?

The Witness: I put a total of \$20,100. Some of that was for own personal furniture that I sold,

as we were liquidating the business, as I came out of the new house, and it was \$1,675, it was new merchandise. It had been in the new home about three months. I merely threw it back into the business and sold it and threw the funds right into the business. The rest of it was by refinancing a mortgage.

Q. (By Mr. Licht): You did that on more than one occasion?

A. Three different times.

Mr. Licht: I have nothing further, your Honor."

It is submitted that the foregoing testimony or any testimony in the transcript of testimony of the plaintiff (Appellee) is no testimony of special damages as defined by Civil Code Section 48A, 4(b) as set forth hereinabove. The testimony shows that this plaintiff (Appellee) was asked by her counsel "How much *additional capital* did you put in because of that" and her testimony had to do with the "additional capital." It is respectfully submitted that putting capital into a business is in the nature of an investment and is not "damages", nor is the Finding Number VII "that the allegations contained in Paragraph VIII are true except that the Court finds that the plaintiff has been damaged in the sum of \$2000" is a finding of special damage predicated upon any testimony that was before the Court for its consideration, and that the failure to find in favor of the defendant (Appellant) that there was no "special damages" as herein defined in libel cases, was error and reversible error on the part of the District Court.

IX.

The Court Below Erred in Failing to Find That as a Matter of Law the Appellee Could Not Recover Any Damages in the Absence of a Specific Finding That the Reports Complained of in Appellee's Amended Complaint Were Not Privileged, or if Privileged That They Were Actuated by Malice.

Again the defendant (Appellant) in its answer appearing on pages 22 and 23 of the Transcript of Record, as an affirmative defense set forth and alleged the defense that because it was a Mercantile Agency compiling and furnishing its services to its subscribers at their specific request that their reports were privileged, and that they were not actuated by malice.

As in the error complained of above that the Lower Court failed to find that the Appellant was a National Credit Agency, so did the Lower Court fail to find on the affirmative defenses set forth under this allegation of error on the part of the Lower Court, and it is again respectfully submitted, without the necessity of again stating the law and referring to the cases, that the affirmative defenses of privilege and lack of malice were affirmative defenses and there was testimony on the subject, but that the Findings are silent on these material issues and there are no Findings on these material issues and that as a matter of law said failure to make Findings on these material issues, even though set up as an affirmative defense, constituted reversible error.

X.

The next point raised as error on the part of the Lower Court and designated in the Points on Appeal as numbers 7 a, b, c, d and e, and found on page 279 of the Transcript of Record, is in effect a restatement of all of the errors hereinabove specifically referred to and set forth in Paragraphs III, VI, VII, VIII and IX hereof, and it would be repetitious to repeat and restate all of the points and authorities and the law applicable to the specification of error referred to as 7 a, b, c, d and e as hereinabove referred to, and it is respectfully suggested that this Court will take the foregoing points into consideration in disposing of this specification of error.

XI.

The Court Below Erred in Finding That the Appellant Was "Grossly Negligent in Its Conduct" as Found in Paragraph V of Appellee's Findings of Fact.

It is respectfully suggested that this point has likewise been fully covered in the foregoing comment appearing under Paragraph Number VI finding that the Appellant was "grossly negligent in its conduct" rather than finding, as it was necessary for the Court to do, on the allegation that the defendant (Appellant) wilfully and maliciously made the reports complained of. To restate the comment under this specification of error would, it is believed, be likewise repetitious and the Court is therefore respectfully referred to the comment and statements set forth in allegation number VI in this brief.

ARGUMENT AND FURTHER POINTS AND AUTHORITIES.

Plaintiff's (Appellee) action is for damages resulting from an alleged libel to which the defendant (Appellant) has set up as a defense "truth" and "qualified privilege" and has denied any damages.

The Chief Judge in this District, the Honorable Judge Leon R. Yankwich, has written several books replete with points and authorities on the subject of libel. His latest work was published in 1950, and it is entitled "It's Libel Or Contempt If You Print It", and it is from this writing, and on page 308 thereof, that counsel desires to argue in favor of Appellant's position and defense, and which writing on page 308 reads as follows:

"The defense of privilege under subdivision 3 of section 47 *does not depend at all on the truth of the defamatory charge.* With respect to that form of qualified privilege *the code does not require that the publication shall be true in order to bring it within the protection of the privilege.* The language of the code clearly implies that the publication may be privileged, although it is untrue. To hold that it is necessary to allege and prove the truth of the charge in order to establish the defense that it was privileged under this subdivision would destroy the distinction between the defense of truth and the defense of privilege, and would render the defense of privilege entirely useless, *since the proof that it was true would be a complete defense* without proof of any other facts and without proving the absence of actual malice.

Furthermore, the proposition that one is not liable for damage, if, without malice, he states something

to another which under the circumstances he is lawfully authorized to tell him, *necessarily implies that the statement made may not be accurate*; that is to say, *that it may be untrue, but that under such circumstances the plaintiff cannot recover damages*. This is the established law in many cases of privilege and no question is ever made about it.”*

Again on page 313 of the same writing under the heading of “Privilege and Malice” it is stated:

“In each case (*communications by or to interested persons*, reports of judicial, legislative or other public proceedings, or reports of public meetings) the privilege is dependent upon the absence of malice in fact.

Such malice in fact is not inferred from the communication or publication.

*Nor is it ever presumed.”***

Counsel for the Appellant believes that the foregoing states some of the basic principles of the law of libel on which the Appellant relies, and that said statement of law would indicate that if Appellant comes within its purview, as it has alleged and believes that it does, then certainly the District Court has erred in finding for the plaintiff and Appellee in this matter and in refusing to grant the motion for a new trial, which was timely made.

In California a distinction is made between libel *per se* or libel that is defamatory on its face and a libel that is not libelous *per se*. This distinction is set forth in Section

*The Code Section referred to is Section 47, subdivision 3 of the Civil Code of the State of California. The italics do not appear in the text but are used by counsel for emphasis.

**The italics do not appear in the text but are used by counsel for emphasis.

45A of the Civil Code of the State of California, which has been quoted in this Brief under Paragraph V. It is respectfully urged that alleged statements claimed to have been made [as appears in Paragraph IV of Appellee's amended complaint, Tr. of R. p. 8] by the defendant (Appellant) importing to the Appellee "the securing of said business by coercion and duress," and in stating that Appellee "had no previous retail furniture experience," that Appellee "employed a manager to operate said business," "that 1954 payments were slow," and that "the bulk of plaintiff's purchases are being made on a C.O.D. basis," are not defamatory or libelous *per se*, and under said Section 45A of the Civil Code of the State of California "defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof. Special damage is defined in Section 48A of the Civil Code."

Even though Appellant's counsel has quoted and referred to the definition of special damages heretofore as appearing in Section 48A, subdivision 4(b) of the Civil Code of the State of California, it is well at this point to set forth its definition again and as follows:

"'Special Damages' are all damages which plaintiff *alleges* and *proves* that he has suffered in respect to his property, business, trade, profession, or occupation including such amounts of money as the plaintiff *alleges* and *proves* he has expended as a result of the alleged libel, and no other."

It is respectfully submitted that Appellee may have alleged "special damage" but has failed to prove "special or any damage."

“Whether a publication is libelous on its face is a question of law.”

The question of privilege is one of law when the facts and circumstances under which a publication is made are not disputed.

Freeman v. Mills, 97 Cal. App. 2d 161 (at pp. 165 and 166).

* * * *

In a late case decided in 1956 the Court stated as follows:

“In Oregon it is well established that *there can be no recovery for a defamatory statement which is qualifiedly privileged, unless it was shown to have been made with actual malice.*”*

Pomeroy v. Dun & Bradstreet, 146 Fed. Supp. at p. 59.

In conclusion counsel for the Appellant respectfully urges that under the pleadings in this matter the Appellee did not prove her case by a preponderance of evidence as is required by law, that she did not prove any “malice or ill will”; that she did not prove any “damages” whether general or special; that it does affirmatively appear that the Appellant is a National Mercantile Credit Agency and that the reports which the Appellant issued were qualifiedly privileged under our law; that they were issued without “malice or ill will”; that they were based upon data and information which they received from the various sources indicated in the transcript of testimony that is before the Court; that they were submitted only

*The italics do not appear in the text but are used by counsel for emphasis.

to subscribers to the service of the Appellant and only at the request of such subscribers; that the statements were “factually and substantially true”, and that the Lower Court erred in each and all of the respects and points hereinabove specifically set forth in this Brief, and as stated by the Court in the case of *Globe Furniture v. Right*, 265 Fed. at page 875, which is a Circuit Court of Appeal Case of the District of Columbia

“It is inconceivable how the business of the country under present conditions, can be carried on, if a businessman or corporation must be subject to litigation for every letter containing some statement too strong, where it is only sent to the person to whom directed, and only heard by a stenographer to whom the letter is dictated.”

Under Rule 59(a)2 of the Federal Rules of Civil Procedure the Court may completely reverse its prior judgment and give judgment for the opposing party if the evidence taken at the trial justifies it and if the motion raises only a question of law, and it is respectfully urged that not only should the judgment in this case be reversed, but rather than ordering a new trial, that following said Rule 59(a)2, the Court direct that judgment be entered in favor of the Appellant for costs.

Respectfully submitted,

CATLIN & CATLIN,

SAMUEL A. MILLER, and

MEYER LINDENBAUM,

By SAMUEL A. MILLER,

Attorneys for Appellant.



No. 15778

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LYON FURNITURE MERCANTILE AGENCY,

Appellant,

vs.

IRENE M. CARRIER, doing business as WISHMAKER
HOUSE,

Appellee.

APPELLANT'S REPLY BRIEF.

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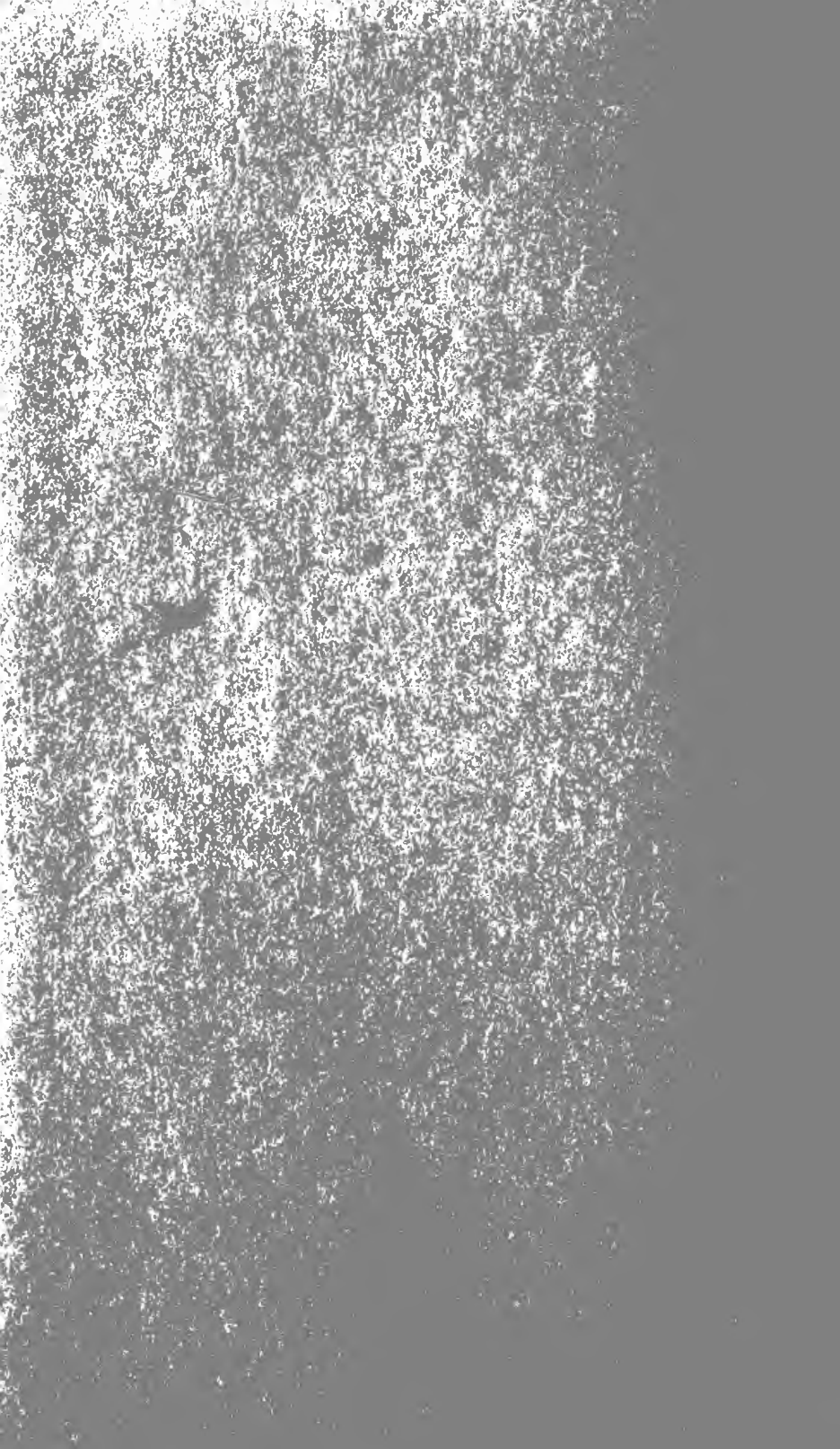
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Appellee.

APPELLANT'S REPLY BRIEF.

Counsel for the appellant believe that the jurisdiction of the Court to hear and determine this appeal, the statement of the case, the factual situation and the questions involved in this appeal have been fairly well stated and settled by the Appellant's Opening Brief and the Appellee's Reply Brief. The appellant does, however, desire to make some comment upon the Reply Brief of the appellee filed herein and does desire to point up the appellee's apparent inability to sustain the judgment given by the Court below either factually or as a matter of law.

I.

Does the Case of *Jefferson v. Stockholders Publishing Co.*, 194 F. 2d 281, Dispose of the Question of the Necessity to File a Cost Bond by a Plaintiff in a Libel Suit as Required by Section 830, Code of Civil Procedure of the State of California?

Appellee seems to contend that the case of *Jefferson v. Stockholders Publishing Co.*, 194 F. 2d 281, disposes of the necessity of a plaintiff in a libel suit being required to file a bond as provided by Section 830 of the California Code of Civil Procedure.

Counsel for the appellant do not believe that the case so holds. Counsel for the appellant believe that a careful reading of the case will disclose that the case was reversed by reason of the *failure of the clerk of the Court to issue a summons at the time of the filing of a complaint* as is required by Rule 4(a) of the Federal Rules of Civil Procedure in all civil cases including actions for libel, and that the necessity for the filing of a bond was not the point in issue but rather the failure of the clerk of the Court to issue the summons as provided by the Rule.

In any event, counsel for the appellant believe that a clear cut decision by the Appellate Court on the question of whether or not it is necessary to file a bond as required by Section 830 of the Code of Civil Procedure at the time of the filing of a complaint for libel in order to maintain such an action would be of great help and assistance for the future guidance of the Judges of the Lower Courts, litigants and counsel in future similar matters.

II.

Is the Appellate in This Matter a Mercantile Agency, and Does It Follow That Its Reports Are Therefore Qualifiedly Privileged and That the Privilege Cannot Be Destroyed by Negligence and That Negligence Cannot Be Substituted for Malice?

Counsel for the appellant believe that there is no dispute between the parties concerning the facts in this case and that the points involved are purely legal. There is no question of what the Lyon Furniture Mercantile Agency did in this matter in the making of its mercantile reports and to whom they were made and when and under what circumstances they were made. These facts are all fully and clearly set forth in the Transcript of Record, in the exhibits and in the Opening and Reply Briefs of the parties, and it is a question of law whether the reports by Lyon Furniture Mercantile Agency were in fact libelous and that therefore damages follow.

The evidence clearly and unequivocally shows that the reports made by Lyon Furniture Mercantile Agency of and about the appellee come squarely and fully within the provisions of Section 47, Subdivision (3) of the Civil Code of the State of California.

That being the case "malice is not inferred from the communications", Section 48, Civil Code of the State of California.

The law in California being as above indicated and the Court below having failed to find on material issues as pointed out in Appellant's Opening Brief and especially on the question of malice, counsel for the appellee seeks to justify the failure to find on material issues and asks this Court to destroy the protection offered Mercantile

Agencies by Section 47, Subdivision (3) of the Civil Code of the State of California and Section 48 of the Civil Code of the State of California by finding that the appellant was "grossly negligent" in making the reports that are the basis of appellee's claim, and that such "gross negligence" infers malice and destroys the "qualified privilege" afforded Mercantile Agencies by the above quoted Sections of the Civil Code of the State of California.

The foregoing in essence is the position of the appellee, and in support of that position appellee cites the case of *Douglas v. Daisley*, 114 Fed. 628 (decided in 1902), as the only case he can find as being "precisely in point to the one at bar" according to Appellee's Reply Brief.

However, the *Douglas v. Daisley* case *supra*, is not a California case nor is it the law of the State of California nor has it been followed in other and later cases as will be hereinafter set forth.

Assuming, without admitting, that the reporter (an employee of the appellant) who created the reports for the appellant concerning the appellee were prepared "in a grossly negligent manner", such "gross negligence" under California Law would not destroy the privilege nor would it infer malice. See *Davis v. Hearst*, 160 Cal. 143 at 167, 172 and 173, cited on page 24 of Appellant's Opening Brief for the pertinent statement concerning negligence as a basis for malice, reading as follows:

"But the truth is that mere negligence or mere carelessness can never be evidence of malice in fact. In the same act they cannot even co-exist. Malice necessarily imports an evil purpose. Negligence necessarily implies an absence of intent or purpose.

“Mere inadvertence or forgetfulness or careless blundering is not evidence of malice, nor is negligence or want of sound discretion nor the mere fact that the statement is not true.”

In the case of *Johns v. Associated Aviation Underwriters*, 203 F. 2d at page 208 (decided in 1953), the plaintiff Johns lost his position as an aviation pilot by reason of a report on his qualifications issued by the defendant Associated Aviation Underwriters (a case similar to our California case of *Freeman v. Mills*, 97 Cal. App. 2d 161, wherein the plaintiff lost his position as an assistant starter at the Santa Anita Race Course by reason of a report concerning Freeman issued by one of the defendants in that case, Thoroughbred Racing Protective Bureau, Inc.).

The plaintiff Johns charged that the communication or report that was sent by the defendant Associated Aviation Underwriters that resulted in his losing his job “*was made with such gross indifference to appellant’s rights as to amount to a wilful or wanton act.*” The evidence, among other things, also showed “that the derogatory statements concerning the appellant were based *upon only two telephone calls* to persons who had known or been associated with him.” (The italics do not appear in the foregoing quoted text but are added by counsel for emphasis.)

The communication was held to be privileged and judgment went for defendant Associated Aviation Underwriters, and on the question of whether malice might be inferred from “gross indifference to the rights of appellant as would amount to wilful or wanton conduct from which malice might be inferred” the Court cited a portion

of the case of *Express Publishing Co. v. Wilkins*, 218 S. W. 614, reading as follows:

“Negligence cannot take the place of actual malice. The inference to be drawn from the proof of gross negligence cannot be substituted for proof of actual malice so as to destroy the immunity from damages given to a privileged publication.” (The italics do not appear in the quotation but are used by counsel for emphasis.)

The Court of Appeals for the Fifth Circuit in the foregoing case affirmed a judgment in favor of the defendant Associated Aviation Underwriters, the appellee herein.

In the case of *Express Publishing Co. v. Wilkins*, *supra*, the phrase “gross negligence” was used in an instruction to the jury on the defense of privilege instead of instructing on actual or express malice as a condition to newspapers liability, and this instruction was held erroneous and the judgment against the newspaper was reversed by the Appellate Court stating:

“In an action for libel by the police judge of a city against a newspaper on account of its article, privileged under Rev. St. 1911, art. 5597, charging that the judge and chief of police had been lax or corrupt in failing to suppress gambling and prostitution at the instance of army officers, an instruction in relation to the defense of privilege, which, instead of speaking of actual or express malice as a condition to defendant newspaper’s liability, spoke of gross negligence, and predicated liability thereon, was erroneous.”

The very late case of *H. E. Crawford Company v. Dun & Bradstreet, Inc.*, 241 F. 2d p. 387 (decided

by the Fourth Circuit Court of Appeals January 8, 1957) in the opinion of counsel for appellant is not only decisive of the law in this case as it was in that case (because apparently the law of libel—privilege and malice is the same in North Carolina as it is in California), but also because it disapproves specifically of the case of *Douglas v. Daisley, supra* (see pages 397 and 398 of *H. E. Crawford Company v. Dun & Bradstreet, Inc., supra*) and because it specifically holds that:

“Under North Carolina law, *negligence was not the equivalent of and could not be substituted for actual malice* in determining whether a Mercantile Agency’s untrue financial report to interested subscribers lost its qualified privilege.” (Italics added by Counsel.)

and in the California case of *Davis v. Hearst, supra*, our Supreme Court held to the same effect legally as is the legal effect of the foregoing quotation from the *Crawford v. Dun & Bradstreet* case, *supra*.

III.

The Question of Damages Awarded by the Lower Court.

Counsel for appellee states that the damages are clearly supported by the evidence.

With the foregoing conclusion and statement of counsel for the appellee the appellant respectfully disagrees.

Reference is made by counsel for the appellant to the law on damages and the evidence *re* damages in this case fully set forth in Appellant’s Opening Brief on pages 26, 27 and 28 thereof.

While damages in substantial amounts are given from time to time in libel and slander suits where the facts,

proof and the law justifies them, such is not the instant case before the Court.

By reason therefore of the facts and the law in this case as set forth herein and in Appellant's Opening Brief, it is respectfully urged that this Court reverse the judgment herein and direct judgment in favor of appellant for costs as provided by Rule 59 (a-2) of the Federal Rules of Procedure.

Respectfully submitted,

CATLIN & CATLIN,
SAMUEL A. MILLER, and
MEYER LINDENBAUM,

By SAMUEL A. MILLER,

Attorneys for Appellant.

No. 15778

United States
Court of Appeals
for the Ninth Circuit

LYON FURNITURE MERCANTILE AGENCY,
Appellant,
vs.

IRENE M. CARRIER, doing business as Wish-
maker House, Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division

FILED

DEC 20 1957

PAUL P. BRENN, CLERK



No. 15778

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LYON FURNITURE MERCANTILE AGENCY,
Appellant,
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maker House, Appellee.

Transcript of Record

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

CATLIN & CATLIN,

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Los Angeles 13, California,

SAMUEL A. MILLER,

208 West 8th Street,
Los Angeles 14, California.

For Appellee:

DAVID G. LICHT,

9399 Wilshire Boulevard,
Beverly Hills, California. [1]*

* Page numbers appearing at bottom of page of Original Transcript of Record.



In the District Court of the United States,
District of California, Central Division

No. 18445-J—Civil

IRENE M. CARRIER, dba WISHMAKER
HOUSE, Plaintiff,

vs.

LYON FURNITURE MERCANTILE AGENCY,
Defendant.

NOTICE OF HEARING

To Irene M. Carrier and to David G. Licht, her
attorney:

You, And Each Of You, Will Please take Notice,
that the undersigned will bring the attached Motion on for hearing before this Court, in the court room of the Honorable Judge Gilbert H. Jertberg, Court Room No. 10, Federal Post Office and Court Building, City of Los Angeles, State of California, on the 23rd day of August, 1955, at 10:00 A.M. on the forenoon of that day, or as soon thereafter as counsel can be heard.

Dated: August 8, 1955.

CATLIN & CATLIN,

/s/ By HENRY W. CATLIN,

/s/ HENRY W. CATLIN,

Attorneys for Defendant. [2]

[Title of District Court and Cause.]

MOTION TO REQUIRE PLAINTIFF TO FILE,
AND MOTION FOR A MORE DEFINITE
STATEMENT

Comes Now the defendant, Lyon Furniture Mercantile Agency, and moves the Court as follows:

First

That plaintiff be required to file an undertaking in the sum of \$500.00, as provided by Section 830 of the California Code of Civil Procedure in actions for libel and slander, and if plaintiff does not file same within the time fixed by the Court, that said action be dismissed.

Second

That plaintiff be directed by this Court to file a more definite statement of the following matters, to wit:

(a) To describe who "certain wholesale furniture dealers" were, together with their addresses, and who "certain furniture manufacturers" were, together with their addresses, as alleged in Paragraph III, in both the First and Second Causes of Action of said complaint, so that this answering defendant can ascertain and [3] determine for the purpose of admitting or denying whether or not such parties were the parties that this answering defendant released to and furnish the credit reports and credit ratings, as therein alleged;

(b) Showing from whom (names and addresses)

plaintiff was unable to secure replacements for her stock, as alleged in Paragraph VI of the First Cause of Action of plaintiff's complaint;

(c) Showing who the majority of the dealers who formerly sold to plaintiff on credit were, and their addresses, that refused to sell to her on credit after the alleged reports were published, that are referred to in Paragraph VI of the First Cause of Action of her complaint;

(d) Showing who the "other members of a combination" referred to in Paragraph II of the Second Cause of Action of plaintiff's complaint were.

CATLIN & CATLIN,
/s/ By HENRY W. CATLIN,
/s/ HENRY W. CATLIN,
Attorneys for Defendant. [4]

Points and Authorities

Point I.

Supporting Motion to Require Undertaking
Be Filed

State of California Code of Civil Procedure,
Section 830.

Kennaley v. Superior Court, 43 Cal. (2nd) 512.

Shell Oil Co. v. Superior Court, 2 Cal. App.
(2nd) 348.

Keller Research Corp. v. Roquerre, 99 Fed. Supp.
964.

Point II.

Supporting Motion for a More Definite Statement

The defendant should be advised of the names of the readers of the alleged libelous matter, for the

6 *Lyon Furniture Mercantile Agency vs.*

purpose of preparing defense, and be advised as to whether the readers were those that defendant furnished the alleged publication to, as defendant cannot be responsible to plaintiff for the voluntary and unjustifiable repetition without its authority or request by others over whom defendant had no control.

16 Cal. Jur. 139.

37 Corp. Jur. 48.

Dill Mtg. Co. v. Acme Air Appliance Co. DC, N.Y. 1941, 2 F.R.D. 151.

Adams v. Hendel DC, Pa, 1939, 28 F. Sup. 317.

Federal Rules of Civil Procedure, Rule 12, Subdivision E. [5]

Affidavit of Service by Mail Attached. [6]

[Endorsed]: Filed Aug. 8, 1955.

[Title of District Court and Cause.]

AMENDED COMPLAINT FOR LIBEL

Comes Now the plaintiff, and pursuant to order of court, and for a first cause of action complains and alleges:

I.

That the plaintiff is a citizen and a resident of the State of Arizona, and doing business under the fictitious firm name and style of Wishmaker House; that the defendant is now and at all times herein mentioned was a partnership composed of persons unknown to plaintiff, doing business under the common name and style of Lyon Furniture Mer-

cantile Agency in the County of Los Angeles, State of California; that the amount of controversy exceeds the sum of Three Thousand (\$3,000.00) Dollars, exclusive of interest and cost.

II.

That the plaintiff individually began the operation of a retail furniture business in the City of Phoenix, Arizona, during the year 1953, having acquired such business by a decree of the [8] Superior Court of Maricopa County, Arizona, from her former husband, Frank N. Carrier, Jr.; and that prior thereto the plaintiff had been actively engaged in the retail furniture business jointly with her ex-husband from the year 1947 to 1953; that at the time plaintiff acquired sole ownership of the business aforesaid, there existed liabilities in excess of Forty Nine Thousand (\$49,000.00) Dollars against said business.

That plaintiff moved said business to its present location in January, 1954; that under plaintiff's management, the business has expanded and liabilities thereon steadily diminished substantially through operation under the circumstances; that prior to March 23, 1954, plaintiff's financial credit rating was good and unquestioned.

III.

That defendant released to certain wholesale furniture dealers a credit report purportedly representing plaintiff's current credit status on March 24, 1954, a copy of which is hereto annexed and made a part hereof, marked Exhibit "A". On April

18, 1955, defendant released a credit report purportedly reflecting plaintiff's credit rating as that time, to certain furniture manufacturers, a copy of which is hereto annexed and made a part hereof, marked Exhibit "B".

IV.

That said reports were and are absolutely false in the following particulars: That by innuendo the reports impute to plaintiff the securing of said business by coercion and duress; that the reports state that plaintiff had no previous retail furniture experience; that plaintiff employed a manager to operate said business; that 1954 payments were slow; that the bulk of plaintiff's purchases are being made on a C.O.D. basis.

V.

That the plaintiff is informed and believes and upon such [9] information and belief alleges that the following named manufacturers have received from the defendant the said Exhibit "A" and/or the said Exhibit "B": Frederick Cooper Studios, 1507 East 55th Street, Chicago, Illinois, American Furniture & Novelty Company, 2601 Flourney Street, Chicago, Illinois; J. S. Greene Company, 1024 West Hillcrest Boulevard, Inglewood, California; B. F. Huntley Company, Winston-Salem, North Carolina; Fine Arts Furniture Manufacturing Company, 6040 Ferguson Drive, Los Angeles 22, California; Caro & Upright, 720 South Los Angeles Street, Van Nuys, California; Charm House, Inc., 14719 Lull Street, Van Nuys, California; Sandford Furniture Company, Sandford, North Carolina.

VI.

That the defendant willfully and maliciously made the aforesaid reports and delivered them to the aforementioned persons and its subscribers, knowing the same to be false when it made them, for the express and sole purpose of destroying the plaintiff's credit and financial standing and of ruining her business.

VII.

That by reason of the making and publication of this said false and libelous reports by the defendant, the plaintiff has not been able to secure replacements for stock of goods on reasonable credit terms requisite to the continual successful operation of her said business from the aforementioned furniture manufacturers and dealers who formerly sold to her on credit, but have refused to sell on such credit since said false reports were made and published.

VIII.

That by reason of the premises, the plaintiff's credit and financial standing have been ruined and her business has been substantially destroyed, and the plaintiff has thereby been made to suffer damages in the sum of Twenty-Five Thousand (\$25,000.00) Dollars. [10]

IX.

That by reason of the defendant's willful malicious publication and delivery of the said false and libelous reports, punitive damages in the sum of \$50,000.00 should be imposed upon said defendant.

For Second Separate Distinct Cause of Action
Plaintiff Alleges:

I.

The plaintiff hereby incorporates by reference paragraphs I through V inclusive of her first cause of action as though the same were here and fully set forth.

II.

That on March 23, 1954, and on April 18, 1955, the defendant and other members of a combination of persons unknown to plaintiff, plaintiff alleges on information and belief, did wrongfully and maliciously combine, conspire, and confederate together, intending to injure plaintiff and destroy her said business and to prevent her earning a subsistence for herself or her family, and the said combination then did wrongfully, falsely, libelously, and maliciously write, utter, and publish the said false statements heretofore referred to in plaintiff's complaint.

III.

That as a result of defendant's unlawful conspiracy, plaintiff was unable to secure on reasonable credit sufficient stock for her business to operate effectively and successfully.

IV.

That the said actions of the defendant have substantially injured and destroyed plaintiff's business, to the plaintiff's damage of \$25,000.00.

Wherefore, plaintiff prays judgment against the defendant in the sum of \$25,000.00 actual damages,

and \$50,000.00 punitive damages, and for costs of this suit.

/s/ DAVID G. LICHT,
Attorney for Plaintiff. [11]

EXHIBIT "A"

Lyon-Red Book Report

This report is furnished, at your request, in accordance with the terms of your contract with the Lyon Furniture Mercantile Agency. It is to be held strictly confidential. It is for your exclusive use and to be used only as an aid to determine the advisability of granting credit.

Carrier, Irene M. Age 45, Divorced (Wishmaker House).

FC&Apl Phoenix, Arizona
1017 E. Camelback Road

Rev: (be-ll) March 23, 1954.

Antecedents: On August 1, 1946, Frank N. Carrier, Jr. acquired this business located at 943 E. Van Buren Street from Joseph Peternel. He is reported to have continued the business until the summer of 1953, when because of reported marital difficulties, the business was taken over by Irene M. Carrier, his wife. She operated under the style Carrier's Furniture Company. About February 15, 1954, she moved to 1017 E. Camelback road and adopted the style, Wishmaker House.

It is learned that Irene M. Carrier has had no previous experience in their retail furniture business and that a manager is employed to operate the business.

During November 1953, Irene M. Carrier was granted an extension by her creditors. The extension agreement called for monthly payments of \$1000. Payments were made as agreed up to February 23, 1954. On March 9, 1954, her attorney's dispatched a letter to creditors requesting a moratorium of the payments of \$1000 per month for a period of three months commencing March 15, 1954 and including April and May installments.

General Information: Present owner during the summer of 1953 acquired this business from her husband who had been the owner since August 1, 1946. During November 1953, she was granted an extension by her creditors and at this time has requested a moratorium for payments for three months commencing March 15, 1954. She recently moved to new quarters in a more favorable area for a business of this type. Quarters occupied are leased.

She retails a general line of furniture, floor coverings, bedding, stoves and electrical appliances. Sales are made for cash and on various credit terms.

Financial Information: Since acquiring this business, Irene M. Carrier has not been disposed to furnish financial statements direct. Interviewed by Agency's local representative on March 4, 1954, she declined all information of a financial nature.

Investigation discloses that she maintains a bank account here, has something in receivables and a low five figure inventory. Liabilities are reported to be relatively heavy. She is now operating under an

extension agreement and has requested a moratorium for three months.

Lacking current statement and due to the present financial condition of the business, no estimate of financial responsibility is advanced.

Trade Investigation: During the latter part of 1953, payments are reported to have been slow.

Inquiry at this time finds payments generally slow with majority of suppliers showing a preference for C.O.D. transactions.

Summary: Present owner acquired this business during the summer of 1953 from her former husband, Frank M. Carrier, Jr. She is now operating under an extension agreement. Current statement has not been supplied direct and no estimate of financial responsibility is advanced. Payments are slow and a number of suppliers have shown a preference for C.O.D. transactions.

L:(C-O-H-N)—Rate: (CON) 13-6—(n.i) [12]

EXHIBIT "B"

Lyon-Red Book Report

This report is furnished, at your request, in accordance with the terms of your contract with the Lyon Furniture Mercantile Agency. It is to be held strictly confidential. It is for your exclusive use and to be used only as an aid to determine the advisability of granting credit.

FC&Apl Phoenix, Arizona
1017 E. Camelback Road

Carrier, Irene M. Age 47, Divorced, (Wishmaker House).

Rev: (dl-ll) April 18, 1955.

Antecedents: On August 1, 1946, Frank N. Carrier, Jr. acquired this business located at 943 E. Van Buren St., from Joseph Peternel. He is reported to have continued the business until the Summer of 1953 when because of reported marital difficulties, the business was taken over by his wife, Irene M. Carrier. She operated under the style, Carrier's Furniture Co. About Feb. 15, 1954, she moved to 1017 E. Camelback Rd. and adopted the style, Wishmaker House.

It is learned that Irene M. Carrier has had no previous experience in the retail furniture line and that a manager is employed to operate the business.

During November 1953, Irene M. Carrier was granted an extension by her creditors. The extension agreement called for monthly payments of \$1000. Payments were made as agreed up to Feb. 23, 1954. On Mar. 9, 1954, her attorneys dispatched a letter to creditors requesting a moratorium of the payments of \$1000 per month for a period of three months commencing March 15, 1954 and including April and May installments.

Irene M. Carrier, through her attorney, during August 1954, offered creditors a 50% compromise settlement, both on open accounts and those accounts that were in judgment. Some of her creditors are reported to have accepted this offer.

During January 1955, Irene M. Carrier offered a single payment of 10% of the original balance due her creditors in full settlement of her account. Some of the creditors accepted this offer, which

including previous payments afforded them 79% of the original balance.

General Information: Business is established. During August 1954, and again during January 1955, she is reported to have made a compromise settlement with some of her creditors. Quarters occupied are leased.

She retails a general line of furniture, floor coverings, bedding, stoves and electrical appliances. Sales are made for cash and on regular credit terms.

Financial Information: The following signed statement was received by mail showing condition as of Mar. 20, 1955:

Assets

Current;

Cash on hand and in bank	591.24	
Accounts receivable	4,065.98	
Mdse. inventory	8,478.17	
Dealers res. Bank	35.10	
Gen. Elec. Credit corp.	698.19	733.29
		<hr/>
Deposits	345.00	
		<hr/>
total current		15,213.68

Fixed assets;

Equipment	3,356.31	
Less res. for deprec.	2,448.79	907.52
		<hr/>
Truck, auto, neon sign net	6,490.00	
Leasehold impr.	2,915.10	
		<hr/>
total fixed		10,312.62

Deferred assets;

Prepaid insurance	1,213.52	
Overpayment to tax comm.	20.40	
		<hr/>
total deferred assets		1,233.92

Total Assets		<hr/> 26,760.22
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Liabilities

Accounts payable current	844.69
Accounts payable Frank Hill*	550.56
A/P Hill payable at 3% per mo.	
Contracts payable Elec. Prod.	391.96
Long term mtge.	
Frank Avinelis**	6,000.00
Res. for taxes	350.00
	<hr/>
Total Liabilities	8,137.21
Net Worth	
Irene Carrier capital	18,623.01
Total	26,760.22

* Note Outstanding accts. payable of \$49,000. reduce to \$9700. and settled with creditor for \$3,000. with the exception of the above listed under Frank Hill.

** Payable at \$100. per mo.

Analysis: As will be noted in statement, accounts payable were reduced from \$4900, by compromise with some of her creditors, to \$9700, and this amount was in turn, settled for \$3,000 with the exception of the amount listed owing Frank Avinelis. Current statement shows liquid and current ratio sub-standard, but net worth ratio above the accepted standards. Her affairs have shown considerable improvement.

Due to the fact that she has made a compromise settlement with some of her creditors, during the past year, no estimate of financial responsibility is advanced.

Trade Investigation: 1953 payments were slow. 1954 payments were slow.

Inquiry of March 29, 1955:

Manner of Payment	Days Slow	High Credit	Owing	Past due	Last sale
1—Discount		200			3/55
2—Prompt		505			
3—Medium	30	130	130		
4—C.O.D.					
5—C.O.D.					
6—C.B.D.					
7—C.B.D.					
8—C.O.D.					

Collection Record

During 1953, eight items of collection were placed with Agency.

Summary: Business is established. During the past year, the owner effected a compromise settlement with some of her creditors. Current statement indicates some improvement in financial condition. No estimate of financial responsibility is advanced. The bulk of her purchases are now being made on a C.O.D. basis.

L:(C-O-H-N) Rate: (Con) 13 (b.i.) [13]

Duly Verified.

Affidavit of Service by Mail Attached. [14]

[Endorsed]: Filed Sept. 21, 1955.

United States District Court, Southern
District of California, Central Division

No. 18,445-J—Civil

MINUTES OF THE COURT

[Title of Cause.]

Date: Aug. 23, 1955. At: Los Angeles, Calif.

Present: Hon. Gilbert H. Jertberg, District
Judge.

Deputy Clerk: S. W. Stacey. Reporter: Helen
Schulke.

Counsel for Plaintiff: David G. Licht.

Counsel for Defendant: Henry W. Catlin.

Proceedings: For hearing on defendant's motion
to (1) require plaintiff to file undertaking for costs,
and (2) for more definite statement.

Court hears argument of counsel. Motion (1) to
require plaintiff to file undertaking for costs is
denied, and motion (2) for more definite statement
is granted, and plaintiff is ordered to make more
definite statement.

JOHN A. CHILDRESS,
Clerk. [7]

[Title of District Court and Cause.]

ANSWER TO PLAINTIFF'S
AMENDED COMPLAINT

Comes Now the defendant, Lyon Furniture Mer-
cantile Agency, and answering plaintiff's amended
complaint admits, denies and alleges as follows:

I.

Answering Paragraph II of the plaintiff's first cause of action, this answering defendant admits that plaintiff individually began the operation of a retail business in the City of Phoenix, Arizona, during the year 1953, having acquired such business by a decree of the Superior Court of Maricopa County, Arizona, from her former husband, Frank N. Carrier, Jr.

Answering plaintiff's allegation "that at the time plaintiff acquired sole ownership of the business aforesaid, there existed liabilities in excess of Forty Nine Thousand Dollars (\$49,000.00) against said business," this answering defendant has no information [15] or belief sufficient to enable it to answer said allegation and basing its denial upon that ground, generally and specifically denies that at the time plaintiff acquired sole ownership of the business there existed liabilities in excess of Forty Nine Thousand Dollars (\$49,000.00), or any other sum.

Further answering Paragraph II, this answering defendant denies generally and specifically each and every allegation therein set forth not herein specifically admitted, and specifically denies that prior to March 23, 1954 plaintiff's financial credit rating was good and unquestioned.

II.

Answering Paragraph III of plaintiff's first cause of action, this answering defendant admits each and every allegation therein contained.

III.

Answering Paragraph IV of plaintiff's first cause of action, this answering defendant denies generally and specifically each and every allegation therein contained.

IV.

Answering Paragraph V of plaintiff's first cause of action, this answering defendant admits that the following named manufacturers have received from defendant the said reports designated Exhibit "A", and/or Exhibit "B" in said Paragraph III of plaintiff's first cause of action: American Furniture & Novelty Company, B. F. Huntly Company, Fine Arts Furniture Manufacturing Company, Caro & Upright, and Sanford Furniture Company; and this answering defendant generally and specifically denies each and every allegation set out in Paragraph V of plaintiff's first cause of action not herein specifically admitted.

V.

Answering Paragraph VI of plaintiff's first cause of action, this answering defendant generally and specifically denies each and [16] every allegation therein contained.

VI.

Answering Paragraph VII of plaintiff's first cause of action, this answering defendant generally and specifically denies each and every allegation therein contained.

VII.

Answering Paragraph VIII of plaintiff's first cause of action, this answering defendant generally

and specifically denies each and every allegation therein contained, and specifically denies that plaintiff has been made to suffer damages in the sum of Twenty Five Thousand Dollars (\$25,000.00), or in any other sum.

VIII.

Answering Paragraph IX of plaintiff's first cause of action, this answering defendant generally and specifically denies each and every allegation therein contained, and specifically denies that punitive damages in the sum of Fifty Thousand Dollars (\$50,000.00) or any other sum, should be imposed upon defendant.

Answering Plaintiff's Second Cause of Action, this answering defendant admits, denies and alleges as follows:

I.

Answering Paragraph I of plaintiff's second cause of action, this answering defendant hereby incorporates by reference Paragraphs I through IV, inclusive, of its answer to plaintiff's first cause of action, as though the same were fully set forth herein and made a part hereof.

II.

Answering Paragraph II of plaintiff's second cause of action, this answering defendant denies, generally and specifically, each and every allegation therein contained.

III.

Answering Paragraph III of plaintiff's second cause of [17] action, this answering defendant de-

nies, generally and specifically, each and every allegation therein contained.

IV.

Answering Paragraph IV of plaintiff's second cause of action, this answering defendant denies, generally and specifically, each and every allegation therein contained, and specifically denies that plaintiff has been damaged in the amount of Twenty Five Thousand Dollars (\$25,000.00), or in any other sum.

For A First, Separate, Distinct and Affirmative Defense, this answering defendant alleges:

I.

That at all times mentioned in said complaint, said defendant was and still is a partnership, authorized to conduct and engage in the business of a mercantile agency, under the laws of the State of California, and as such to compile and furnish to subscribers to its services, at their specific request, information of the history, standing and condition of business, person or persons, corporation or corporations, firms, association or associations, and that at all of said times defendant was and still is doing business under the fictitious name and style of Lyon Furniture Mercantile Agency, and that its said business was conducting the business of a mercantile agency by compiling and furnishing to its subscribers, on request, information of the history, standing, and condition of merchants, traders and others engaged in business within the limits of the United States, or elsewhere.

II.

That in pursuance of its said business as a mercantile agency said defendant, prior to and at the times set forth in said complaint was, and still is, employed as agent by many corporations, firms, associations and individuals, as subscribers, doing business in the United States and elsewhere, to ascertain and compile information of the history, estimated financial worth, and credit standing of corporations, firms, associations and individuals, doing business in said territory, and to furnish the same to said subscribers only upon request therefor.

That prior to and at the time mentioned in said complaint this defendant was and still is employed by said subscribers under the terms of a written subscription form or employment agreement with each of said subscribers, by which said subscriber agreed and agrees that said information was and is to be used solely for credit purposes and for the sole use, benefit and information of said subscribers in transactions involving the extension of financial credit by him, it or them, and that said information was and is to be communicated, and was and is to be held in strict confidence and never to be revealed to others than the subscriber so requesting.

III.

That prior to and at the times mentioned in plaintiff's complaint said defendant, in performance of its duty as agent and employee of its subscribers, as aforesaid, and at their special request to obtain a credit report as to plaintiff herein, em-

employed skilled and competent reporters and investigators to ascertain said information, and after due investigation from sources reasonably believed by defendant to be reliable, compiled said information in good faith and prepared the credit reports as set forth in plaintiff's complaint as plaintiff's Exhibits "A" and "B." Thereafter defendant sent the same on to those of its subscribers who had specifically requested said reports, in due course of defendant's business, in good faith, in confidence, and without malice, on a privileged occasion and as a privileged communication to interested subscribers.

IV.

That said reports to which plaintiff refers were not at any time published or delivered by said defendant except in good faith, [18] without malice, in strict confidence, to persons, firms, corporations or associations as subscribers interested in the subject thereof, at their request, pursuant to defendant's obligation to furnish same, solely for their information and use, and defendant had reasonable cause to believe and did believe the matters set forth in said reports to be true.

For A Second, Separate, Distinct and Affirmative Defense, this answering defendant alleges:

That the statements, and each of them, set forth in Exhibits "A" and "B" of plaintiff's complaint are all true, and were prepared and furnished to said firms so requesting said information from this defendant in good faith and without malice.

Wherefore, defendant prays that plaintiff take

nothing by her complaint and that defendant have its costs herein expended, and such other and further relief as may be meet and just in the premises.

CATLIN & CATLIN,
/s/ By HENRY W. CATLIN,
/s/ HENRY W. CATLIN,
Attorneys for Defendant. [19]

Affidavit of Service by Mail Attached. [20]
[Endorsed]: Filed Oct. 18, 1955.

[Title of District Court and Cause.]

SUBSTITUTION OF ATTORNEYS FOR DEFENDANT

It Is Hereby Stipulated and Agreed by and between William E. and Henry W. Catlin and Catlin & Catlin as the present attorneys of record for the defendant, Lyon Furniture Mercantile Agency, that attorneys William E. and Henry W. Catlin and Catlin & Catlin and Samuel A. Miller be substituted in their place and stead as attorneys for the defendant.

Dated: May 16, 1957.

WILLIAM E. AND HENRY W.
CATLIN AND
CATLIN & CATLIN,
/s/ By HENRY W. CATLIN,
Present Attorneys of Record.

The undersigned, the substituted attorneys of record for the defendant do hereby accept the em-

ployment and agree to become substituted as the attorneys of record for the defendant in place and in stead of the present attorneys of record. [21]

Dated: May 16, 1957.

WILLIAM E. AND HENRY W.
CATLIN AND
CATLIN & CATLIN AND
SAMUEL A. MILLER,

/s/ By SAMUEL A. MILLER.

The undersigned does hereby agree to become associated with William E. and Henry W. Catlin and Catlin & Catlin as one of the attorneys of record for the defendant in the above entitled action.

Dated: May 16, 1957.

/s/ SAMUEL A. MILLER.

The undersigned, Lyon Furniture Mercantile Agency, the defendant herein, does hereby agree to the substitution of attorneys as hereinabove set forth.

Dated: May 16, 1957.

LYON FURNITURE
MERCANTILE AGENCY,

/s/ By JOHN J. SIGERSON,
General Manager,
Defendant.

It Is So Ordered.

Dated: May 20, 1957.

/s/ THURMAN CLARKE,
U. S. District Judge. [22]

[Endorsed]: Filed May 20, 1957.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on May 14, 1957, and was continued until May 15, 1957, and thereafter until May 16, 1957 on which day it was submitted to the Honorable Thurman Clarke, judge presiding without a jury, a jury having been expressly waived, David G. Licht appearing as attorney for the plaintiff, and Catlin & Catlin by William E. Catlin and George L. Catlin appearing as attorneys for the defendant, and the court having heard the testimony and having examined the proofs offered by the respective parties and the cause having been submitted to the court for decision, and the court being fully advised in the premises now makes its findings of fact as follows:

Findings of Fact

I.

That the plaintiff is a citizen and resident of the State of Arizona; that the defendant is a partnership doing [23] business under the common name and style of Lyon Furniture Mercantile Agency, in the State of California.

II.

That the allegations contained in paragraphs II and III of the amended complaint are true.

III.

That many of the allegations made in the reports set forth in paragraph IV of the amended com-

plaint, and prepared by the defendant about the plaintiff were false and untrue.

IV.

That the said reports were circulated to the persons set forth in paragraph V of the amended complaint except Frederick Cooper Studios, and to other persons unknown.

V.

That the defendant, acting by and through its duly authorized agents and servants, was grossly negligent in the preparation of the aforesaid reports in that then and there was in its possession information showing a substantially more favorable condition of plaintiff's business and of plaintiff's financial condition than was reported. The defendant was grossly negligent in the interpretation of the financial condition of the plaintiff as disclosed by the aforesaid statements and information then and there available to defendant.

VI.

That the allegations contained in paragraph VII of the plaintiff's amended complaint are true.

VII.

That the allegations contained in paragraph VIII are true except that the court finds that the plaintiff has been damaged in the sum of Two Thousand (\$2,000) Dollars.

From the foregoing facts, the court concludes:

Conclusions of Law

That the plaintiff is entitled to judgment against

the defendant in the sum of Two Thousand (\$2,000) Dollars.

II.

That the plaintiff is entitled to judgment for his costs and disbursements incurred or expended herein.

Let Judgment Be Entered Accordingly.

Dated: This 23rd day of August, 1957.

/s/ THURMAN CLARKE,

Judge of the District Court. [25]

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Aug. 23, 1957.

United States District Court, Southern
District of California, Central Division

18445-T Civil

IRENE M. CARRIER, dba, Wishmaker House,
Plaintiff,

vs.

LYON FURNITURE MERCANTILE AGENCY,
Defendant.

JUDGMENT

This cause came on regularly for trial before the Honorable Thurman Clarke, sitting without a jury, a jury having been specifically waived, on May 14, 1957, David G. Licht appeared as attorney for the plaintiff and Catlin & Catlin by William E. Catlin and George L. Catlin, appeared as attorneys for the defendant, and the court having heard the testimony and having examined the proof by the

respective parties and the court being fully advised in the premises, and having filed herein its findings of fact and conclusions of law, and having directed that judgment be entered in accordance therewith; now, therefore, by reason of the law and findings aforesaid:

It Is Hereby Ordered, Adjudged and Decreed:

I.

That the plaintiff have judgment against the defendant in the sum of Two Thousand (\$2,000) Dollars, with interest thereon at the rate of seven per cent (7%) per annum from the date hereof until paid. [26]

II.

That the plaintiff have judgment against the defendant for her costs herein in the sum of \$130.96. 9/16/57.

Dated: This 23rd day of August, 1957.

/s/ THURMAN CLARKE,

Judge of the District Court. [27]

Affidavit of Service by Mail Attached.

[Endorsed]: Filed and Entered Aug. 23, 1957.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR A NEW TRIAL
AND FOR AN ORDER DIRECTING THE
ENTRY OF A JUDGMENT FOR DEFEND-
ANT

To The Plaintiff Herein, and to David G. Licht,
Her Attorney:

Please Take Notice that on Monday, the 23rd day

of September, 1957, at the hour of 10:00 o'clock A.M. or as soon thereafter as the matter can be heard, the defendant will move the Honorable Judge Thurman Clarke, in his courtroom on the Second Floor of the Federal Building, Temple and Spring Streets, Los Angeles, California, for an Order vacating the judgment for plaintiff on Findings filed on August 23, 1957, which judgment was entered on August 23, 1957, for an Order granting a new trial to the defendant herein, for an Order amending the Findings of Fact and Conclusions of Law, and for an Order directing the entry of a new judgment in favor of the defendant, and for such other Order or Orders as may be proper and just.

This motion will be based upon the files, records, points and authorities to be filed, and the transcript of testimony heretofore taken in this action and on file in this proceeding, and upon the following grounds: [28]

a. Insufficiency of the evidence to justify the verdict or other decision in that there was produced no evidence by the plaintiff to prove that the reports complained of were issued wilfully and maliciously as alleged in paragraph VI of plaintiff's amended complaint.

b. Error in law occurring at the trial in that the Court failed to find as a matter of law that the reports alleged to have been issued by the defendant as alleged in Paragraph III of plaintiff's amended complaint and Paragraph VI of plaintiff's amended complaint and as set forth in defendant's first and

second affirmative defense were “qualifiedly privileged” under the law.

c. That the Findings are against the evidence which clearly shows in the transcript of the testimony.

d. That the Court has failed to find on material allegations both in plaintiff’s amended complaint and in the defendant’s answer in the following respects: The Court has failed to find and there is no finding with respect to the allegation set forth in Paragraph IV of plaintiff’s amended complaint; the Court has failed to find and there is no Finding with respect to the allegation set forth in Paragraph VI of plaintiff’s amended complaint; the Court has failed to find and there is no Finding with respect to the allegation set forth in Paragraph IX of plaintiff’s amended complaint; the Court has failed to find and there is no Finding with respect to the allegation set forth in defendant’s first and second affirmative defenses.

e. The Court erred in not finding that the communications were privileged and were published without malice.

f. There is no evidence to support the Finding that the defendant was “grossly negligent in its conduct” as found in Paragraph V of the Findings on file herein.

g. The Court erred in not granting the defendant’s motion requiring the plaintiff to file an undertaking as a condition precedent to the maintenance of this action for libel.

h. The Court further erred in not granting the

defendant's motion for a dismissal at the conclusion of the plaintiff's evidence.

Dated: September 3, 1957. [29]

CATLIN & CATLIN,
SAMUEL A. MILLER &
MEYER LINDENBAUM,

/s/ By SAMUEL A. MILLER,
Attorneys for Defendant. [30]

Affidavit of Service by Mail Attached. [31]

[Endorsed]: Filed Sept. 3, 1957.

[Title of District Court and Cause.]

POINTS AND AUTHORITIES IN SUPPORT
OF DEFENDANT'S MOTION FOR A NEW
TRIAL AND FOR AN ORDER DIRECT-
ING THE ENTRY OF A JUDGMENT FOR
DEFENDANT AND FOR AN ORDER
AMENDING THE FINDINGS OF FACT
AND CONCLUSIONS OF LAW

The defendant's presents for the Court's consideration the following Points and Authorities in support of and in connection with its various motions set forth in the title to this document.

This is an action for damages resulting from an alleged libel to which the defendant has set up a defense of "truth" and "qualified privilege" and has denied any damages.

It is doubtless within the knowledge of the Honorable Judge before whom this matter is pending that a fellow Judge of the District Court of the

United States, to-wit, the Honorable Chief Judge Leon R. Yankwich, has written several books replete with points and authorities on the subject of libel. His latest work was published in 1950 and is entitled "It's Libel or Contempt if You Print It," and it is from this writing on page 308 thereof, that the following is respectfully called to the Court's attention:

"The defense of privilege under subdivision 3 of [32] section 47 does not depend at all on the truth of the defamatory charge. With respect to that form of qualified privilege the code does not require that the publication shall be true in order to bring it within the protection of the privilege. The language of the code clearly implies that the publication may be privileged, although it is untrue. To hold that it is necessary to allege and prove the truth of the charge in order to establish the defense that it was privileged under this subdivision would destroy the distinction between the defense of truth and the defense of privilege, and would render the defense of privilege entirely useless, since the proof that it was true would be a complete defense without proof of any other facts and without proving the absence of actual malice.

Furthermore, the proposition that one is not liable for damage, if, without malice, he states something to another which under the circumstances he is lawfully authorized to tell him, necessarily implies that the statement made may not be accurate; that is to say, that it may be untrue, but that under such circumstances the plaintiff cannot recover damages. This is the established law in

many cases of privilege and no question is ever made about it.”

(The Code Section referred to is Section 47, subdivision 3 of the Civil Code of the State of California. The underscoring does not appear in the text but is used by counsel for emphasis.)

Again on page 313 of the same writing under the heading of “Privilege and Malice” it is stated:

“In each case (communications by or to interested [33] persons, reports of judicial, legislative or other public proceedings, or reports of public meetings) the privilege is dependent upon the absence of malice in fact.

Such malice in fact is not inferred from the communication or publication. Nor is it ever presumed.”

(The underscoring does not appear in the text but is used by counsel for emphasis.)

Counsel believes that with the foregoing basic principal of law in mind the Court will have little trouble in determining that from the points and authorities hereinafter set forth that the alleged libel in this case comes clearly within the qualified privilege of subdivision 3 of Section 47 of the Civil Code of the State of California, and that “malice is not inferred from the communication,” as is clearly set forth in Section 48 of the Civil Code of the State of California.

“Whether a publication is libelous on its face is a question of law.”

The question of privilege is one of law when the facts and circumstances under which a publication is made are not disputed.

Freeman v. Mills, 97 Cal. App. 2nd, p. 161 (p. 165 and 166).

On a motion for a new trial in an action tried without a jury the Trial Court may amend findings of fact and conclusions of law and direct the entry of a new judgment.

Federal Rules of Civil Procedure 59(a) 2.

See Rule 52(b).

By virtue of Rule 59(a) 2 the Court may completely reverse its prior judgment and give judgment for the opposing party if the evidence taken at the trial justifies it and if the motion raises only a question of law.

Phelan v. Middle States Oil Corporation, 210 Fed. 2nd, 360. [34]

Hutches v. Renfroe, 200 Fed. 2nd, p. 337.

The granting or denial of a new trial is in the sound discretion of the trial judge.

Somerville v. Capital Transit Co., 192 Fed. 2nd, p. 413.

In the event the evidence discloses a case of qualified privilege, malice is not presumed; and in order to state a cause of action the plaintiff must allege and prove malice.

Locke v. Mitchell, 7 Cal. 2nd, p. 599.

(The underscoring does not appear in the text but is used by counsel for emphasis.)

In a late case decided in 1956 the Court stated as follows:

"In Oregon it is well established that there can be no recovery for a defamatory statement which is qualifiedly privileged, unless it was shown to have been made with actual malice."

Pomeroy v. Dun & Bradstreet, 146 Fed. Supp. at p. 59.

(The underscoring does not appear in the text but is used by counsel for emphasis.)

It is a general rule that a mercantile agency's credit report to interested subscribers is qualifiedly privileged. In the case before the Court there can be no question but that the defendant is a mercantile agency (see the testimony of John J. Sigerson, the General Manager at page 228 to page 231 inclusive of the reporter's transcript of testimony on file herein. Also see the testimony of the plaintiff on page 50, line 21 to page 51 line 14), and in the case of Cullum dba Cullum Motor Sales v. Dun & Bradstreet, Inc., found in 90 Southeastern Reporter 2nd at p. 370 (which is a case of the Supreme Court of the State of South Carolina decided December 6, 1956), the Court said:

"The defense of qualified privilege is available to [35] a mercantile agency in respect to reports on credit and financial standing of an individual or business concern communicated confidentially, and in good faith, to a subscriber having an interest in the particular matter. Report by a mercantile agency to a subscriber who had requested information concerning financial condition of an automobile dealer was qualifiedly privileged, and although false, was not actionable in absence of malice."

To the same effect as the foregoing is the case of Watwood v. Stone's Mercantile Agency, Inc., 194 Fed. 2nd, 160 (Certiorari denied, 344 U. S. 821).

Malice is defined as ill will toward another, as evidenced by an attempt to wrongfully vex, injure

or annoy another. This malice may be designated either malice in fact or express malice. Malice is not inferred from the communication.

Civil Code State of California, Section 48.

Davis vs. Hearst, 160 Cal. 143 at p. 164.

Miles vs. Rosenthal, 90 Cal. App. 390.

In the instant case the Court found (Finding Number V) that the defendant was grossly negligent in the preparation of its reports and in the interpretation of plaintiff's financial standing. Said finding of gross negligence is not supported by the evidence and a finding of negligence does not destroy the defendant's qualified privilege.

"But the truth is that mere negligence or mere carelessness can never be evidence of malice in fact. In the same act they cannot even co-exist. Malice necessarily imports an evil purpose.

Negligence necessarily implies an absence of intent or purpose.

Mere inadvertence or forgetfulness or careless [36] blundering is not evidence of malice, nor is negligence or want of sound discretion nor the mere fact that the statement is not true."

Davis v. Hearst, 160 Cal. 143 at p. 167 and at pages 172 and 173.

(The underscoring does not appear in the text but is used by counsel for emphasis.)

The plaintiff's testimony in this action and the admissions of her counsel which appear at page 249 of the Reporter's Transcript, acknowledge the fact that at no time did the defendant nor any of its agents have evil motives toward the plaintiff or attempt to vex, annoy or injure her. It was the

undisputed testimony of plaintiff that at the time these reports were published she had no contact with the defendant or its agents (Reporter's Transcript, page 57).

It is respectfully urged that the Court should amend its Findings of Fact in the several instances set forth and referred to in the motion presently before the Court for a new trial, for a judgment and for amendment of Findings of Fact and Conclusions of Law.

That is specifically find that the communications set forth and referred to in the plaintiff's complaint and in the oral amendments made to the plaintiff's complaint made in Open Court were privileged communications on the part of this defendant.

That the Court further find that said privileged communications were published without malice in the light of the fact that the law does not presume malice in a qualifiedly privileged communication and in the light of the fact that nowhere in the evidence and as set forth in the Reporter's Transcript of the testimony herein does it appear by evidence from any source that the defendant was actuated by malice in submitting the reports which it did submit to interested parties who were members and subscribers by contract with the defendant as was stipulated to in Open Court at the time of trial, and finally;

That the Court in the alternative either enter a judgment in favor of the defendant as provided for by Federal Rule 59(a) 2, or grant the defendant's

[37] motion for a new trial and to amend the Findings in the particulars indicated.

Respectfully submitted,

CATLIN & CATLIN,
SAMUEL A. MILLER &
MEYER LINDENBAUM,

/s/ By SAMUEL A. MILLER,
Attorneys for Defendant. [38]

Affidavit of Service by Mail Attached. [39]

[Endorsed]: Filed Sept. 11, 1957.

United States District Court, Southern District
of California, Central Division

No. 18445-TC Civil

[Title of Cause.]

MINUTES OF THE COURT

Date: September 24, 1957. At: Los Angeles, Calif.

Present: Hon. Thurmond Clarke, District Judge.

Deputy Clerk: E. J. Fisher; Reporter: None.

Counsel for Plaintiff: No appearance.

Counsel for Defendant: No appearance.

Proceedings: It Is Ordered that defendant's motion for new trial, heretofore heard and submitted September 23, 1957, be and hereby is denied.

Counsel notified.

JOHN A. CHILDRESS,
Clerk,

/s/ By E. J. FISHER,
Deputy Clerk. [40]

[Title of District Court and Cause.]

STIPULATION RE AMOUNT OF COST BOND
ON APPEAL AND SUPERSEDEAS BOND
AND ORDER THEREON (F. R. of C. P.
Rule 73 (c) - (d))

It Is Hereby Stipulated and Agreed by and between the parties hereto by their respective counsel of record that the filing of a surety bond on behalf of the defendant herein, Lyon Furniture Mercantile Agency, in the sum of \$3,000.00 shall be considered as an amount sufficient to comply with Rule 73(c) (cost bond on appeal) and (d) (supersedeas bond) of the Federal Rules of Civil Procedure.

Dated: October 1, 1957.

/s/ DAVID G. LICHT,
Attorney for Plaintiff.

CATLIN & CATLIN,
SAMUEL A. MILLER &
MEYER LINDENBAUM,

/s/ By SAMUEL A. MILLER,
Attorneys for Defendant. [41]

ORDER ON FOREGOING STIPULATION

Upon reading and filing the foregoing stipulation
It Is So Ordered.

Dated: October 3rd, 1957.

/s/ LEON R. YANKWICH,
U. S. District Judge. [42]

[Endorsed]: Filed Oct. 3, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the United States District Court,
and to Irene M. Carrier dba Wishmaker House,
Plaintiff, and to David G. Licht, Attorney for
the Plaintiff:

You and Each of You Will Please Take Notice
As Follows:

Notice Is Hereby Given that Lyon Furniture
Mercantile Agency, defendant above named, hereby
appeals to the United States Court of Appeals for
the Ninth Circuit from the final judgment entered
in this action on the 23rd day of August, 1957, in
favor of the plaintiff and against the defendant
for the sum of \$2,000.00 as damages, together with
interest from the 23rd day of August, 1957, and for
costs taxed under date of September 16, 1957, in
the sum of \$130.96, and from the whole thereof.

Dated: October 11th, 1957.

CATLIN & CATLIN,
SAMUEL A. MILLER &
MEYER LINDENBAUM,

/s/ By SAMUEL A. MILLER,
Attorneys for Appellant. [43]

[Endorsed]: Filed Oct. 11, 1957.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above entitled matter:

A. The foregoing pages numbered 1 to 46, inclusive, containing the original:

Notice of Hearing and Motion to Require Plaintiff to file an undertaking and motion for more definite statement.

Minute Orders of Court—8/23/55 and 9/24/57.

Amended Complaint for Libel.

Answer to Plaintiff's Amended Complaint.

Substitution of Attorneys for Defendant.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Motion and Motion for a New Trial and for an Order directing the entry of a Judgment for Defendant.

Points and Authorities in support of Defendant's motion for a New Trial and for an Order directing the entry of a Judgment for Defendant and for an Order Amending the Findings of Fact and Conclusions of Law.

Stipulation Re Amount of Cost Bond on Appeal and Supersedeas Bond and Order Thereon.

Notice of Appeal.

Designation of Record on Appeal.

B. Plaintiff's Exhibits 1 to 16 inclusive. Defendant's Exhibits A to I, inclusive.

the Defendant: Catlin & Catlin, by William E. Catlin, George L. Catlin, 433 South Spring St., Suite 622, Los Angeles 13, California, and Meyer Lindenbaum, New York, New York. [1]*

The Clerk: Case No. 18,445-TC Civil, Irene M. Carrier, dba Wishmaker House vs. Lyon Furniture Mercantile Agency, for court trial.

Mr. Licht: Ready for the plaintiff.

The Clerk: Both counsel wish to move for association of counsel.

The Court: Yes. Do you want to move for association of counsel?

Mr. W. E. Catlin: If your Honor please, prior to that I would like to clear up a matter. I am informed the record does not reflect dismissal of the Second Cause of Action as we agreed in our stipulation in open court at the pretrial hearing. If this is correct, I would like the correction made, showing that cause number two was dismissed.

The Court: All right. Dismiss it.

The Clerk: It was dismissed.

The Court: Yes, before Judge Jertberg.

Mr. W. E. Catlin: Then, I have the motion.

The Court: All right.

Mr. W. E. Catlin: If the court please, I would like to move for the association for the defendant in this matter of Meyer Lindenbaum, attorney at law, member of the New York Bar and admitted to practice in the Federal Courts of [3] New York.

The Court: All right. I am very happy to have you.

* Page numbers appearing at top of page of Reporter's Original Transcript of Record.

Mr. Lindenbaum: Thank you.

Mr. Licht: Your Honor, I have a similar motion on behalf of the plaintiff, for the association of Otto Linsenmeyer, a member of the Arizona Bar and a member in good standing of the Federal Court.

The Court: All right. I will be very happy to have you.

You may proceed, Mr. Licht.

Opening Statement on Behalf of Plaintiff by
Mr. Licht

Mr. Licht: Your Honor, this case involves I believe a rather unique situation.

My client, Irene Carrier, is in business in Phoenix, Arizona, doing business under the firm name and style of Wishmaker House, which is a retail store for the sale of furniture and appliances. She took over sole possession of that store from herself and her husband who had been operating it theretofore, in 1953. At that time, and theretofore, she had been actively engaged in working in the store, being charged with the jobs of selling and buying and advertising. And her husband, who we expect the evidence will show was a man of considerable education in the field of finance, was charged with the job of financing and making the payments and paying the bills and so forth of the business.

Sometime in March or April of that year, 1953, Mr. [4] Carrier went on a cruise apparently for his health and did not return. The first knowledge that Mrs. Carrier had of his not returning was some few weeks later, when he notified her that he did not wish to return, indicating that their marriage should be terminated.

In the meantime, she had taken over full control of the business. And the very next day after her husband left, a man from what turned out to be one of the largest creditors said, "We have a large sum due, and what are you going to do about it?" And this Mrs. Carrier will testify was the first inkling she had that there was any kind of a financial problem at all, the business theretofore having been quite substantial and she having had no information whatever that there were any problems.

She made a hurried examination of the facts and determined that there were at that time some \$49,000 in outstanding liabilities, the great majority of which were not current but were from 60 to 90 or more days old.

Mrs. Carrier then determined that certain drastic steps would be necessary in order to get the business out of this predicament, and she proceeded to do just that. She made what arrangements she could. She obtained counsel immediately to help her examine the situation, and she began what appears in my mind to be one of the most amazing recoveries that I have ever seen in such a situation. [5]

In a period of approximately three months, she had reduced the outstanding indebtedness on these old bills, naturally paying whatever current bills were present, from approximately \$49,000 mentioned to some \$35,000, and she was still being pressed considerably by a number of creditors, particularly in view of the fact that information was then available to everybody that her husband was no longer on the premises, and he was active before that.

And so, and on advice of her attorneys and of the credit managers association in Phoenix, there was an arrangement made with the creditors which provided that Mrs. Carrier would pay \$16,000 that she had accumulated during the time when this deal was being negotiated, \$6,000 from another sale and \$10,000 from some funds that her husband had on deposit or were available in the bank, which was to be applied immediately to the balance of \$35,000, reducing it to some \$19,000, and that the balance of \$19,000 would be paid off at the rate of \$1,000 per month. And this I would like to stress the point was in continuing operation of the business. In other words, this money was having to be paid out of the sales on profits of the business, irrespective of the obligations to pay for the current merchandise that was being delivered. And she paid that. That was agreed to by all the creditors. She paid the \$16,000, and she paid several payments on the \$19,000 balance that was left, bringing that [6] down to about fifteen or sixteen thousand dollars.

By that time the spring of 1954 had arrived and as your Honor is perhaps aware of, that Phoenix business becomes very stagnant during the spring and summer months, because of the heat.

So she again asked the creditors to give her an extended amount of time to pay off the then balance of approximately \$16,000, or a moratorium of three months, which they agreed to do.

To make a long story short, during the next year she reduced these claims to about \$9,000, by many means which she can tell better than I. At the end of that period, she then owed a balance of \$9,000,

and on advice of both her attorney and the man from the credit association who will be a witness here sometime today, she determined to get some funds from her friends or another mortgage on her house or some such way to pay them off, and she ultimately settled this balance of \$9,000 for a payment of \$3,000, which would have been approximately two years after she took over complete control of the business.

In summary, it means that when she took over the business there were \$49,000 worth of debts, and in the period of two years, in addition to running her business and running her home and taking care of her children as she was then obligated to do, she paid off \$43,000 of the \$49,000 in old debts [7] that existed as old debts at the time of the operation of the business by her husband.

Now, as the court is also probably aware, there is in the furniture business the Lyon Furniture Mercantile Agency, the defendant here. Their job, their business is composed entirely of two facets. One is the collection facet in which they make certain collections on behalf of their customers who are generally the manufacturers in the furniture business, and the other is credit reporting. That is, when a manufacturer gets an order from a firm such as Wishmaker House, he gets in touch with Lyon and gets a report and determines from that report whether or not he should ship to them or whether or not he should extend them any credit. This seems to me to be a job which requires a great deal of consideration, and after all, entails the very lifeblood of a person's business.

If Lyon gives them a so-called bad rating, that is a rating which would require the manufacturer either not to ship to them or to ship to them on a C.O.D. basis, then, the person who has such a rating is almost unable to do business, for it seems rather obvious that if they can't get credit for at least during the period in which they themselves receive the money for the merchandise, they cannot continue to function as a business. And so, the reporting of Lyon's is of extreme importance to them. [8]

I wish to make it clear at this point that my client, Mrs. Carrier, was not ever nor is she now a member of Lyon's; that Lyon's have undertaken in pursuit of their business to make a report on retail people and in this case on my client, Mrs. Carrier, which it seems obvious is their privilege, it is their job, it is the way they are making their living.

The plaintiff's case, your Honor, is rather simple at this point. It is our contention that these persons, having undertaken to make a report on a person without any choice on their part, have a duty to that person to do it truthfully and honestly and sincerely, they have a duty to report what facts they know, be they good or be they bad.

The reports that Lyon put out on Mrs. Carrier during these years from '53 to the present are quite obviously bad as the record will show.

We will show by the testimony of the man who made the reports that he had substantial other information in his file that he did not disclose and still does not disclose today. That information we will also show, would logically be of interest to a man

who is questioning whether or not he should extend credit to this person.

That is all their duty is. Their duty is to disclose what facts they have to their customers and the customers determine whether they should pass credit to a prospective buyer or not. [9]

We will show that there was certain vital information which was withheld, the most vital of which was the very fact that this woman had undertaken to bring this business back from the depths that it was, that they knew it, because they had hired an attorney in Phoenix to represent certain members of their organization, who had proceeded with collections, that their collections were paid some six to nine months before several of the reports were made and they never disclosed that the payments were made. They made certain statements in there that she had no experience in the business, a fact which their own records disclose to be not true.

They further stated that she had hired a manager to operate the business, a statement which is also not true. She never had a manager. And that is important from the standpoint of a credit manager, because he could say to himself, well, here is a woman without any experience and she hired a manager to run it, there must be something wrong.

They knew that she had paid off these claims in the most amazing manner possible in a period of less than two years, that their clients had gotten almost a hundred cents on the dollar of every collection they had; they kept printing in their reports that they had matters for collection; they never once said that they had been paid.

And I will show detail after detail in the report [10] prepared by these people that there was information available and important to a credit manager in any firm, which was not there and it is my conclusion from that, that had they had that information, many of the manufacturers who refused to give her credit would have given her credit, and as a result she sustained damages.

Now, on the question of damage, your Honor, I am aware that we are in a field most difficult to determine.

We will have some evidence of the earnings of the business before this first report was brought out on Mrs. Carrier, and I am aware that there have been substantial changes in the business.

I am also aware that we are in a field which closely borders on the speculative.

However, Mrs. Carrier will testify as best she is able how much reasonably at a minimum business she could have done had she had a decent credit report, a credit report based on just what the facts were. She was in fact a slow pay during this period, there is no question about that, but the reason she was a slow pay was the reason that we feel had the credit people had a chance to see, they would have felt as I feel, that this was a woman who deserved a reasonable chance, some amount of credit, and I say, your Honor, there were only two manufacturers in the United States that continued to extend her credit, and this was because they knew [11] her personally, and any other manufacturer reading a report from Lyon's would not continue to extend

her credit, and I will introduce some evidence of that. As a matter of fact, I intend to have one witness who will testify that the rating they make in the book which in this case is a 13-6 rating for Mrs. Carrier would keep him from even making a call on her as an account. This is important, your Honor, in assessing damages.

The Court: Now, do you want to make an opening statement at this time?

Mr. W. E. Catlin: I will withhold it.

The Court: They will withhold their statement.

Mr. W. E. Catlin: Excuse me. I would like to present counsel with a trial brief.

The Court: All right.

Mr. Licht: I have already submitted my trial brief, your Honor.

The Court: All right, I have yours.

Mr. Licht: It was filed this morning.

IRENE M. CARRIER

plaintiff herein, called as a witness on her own behalf, being first duly sworn, testified as follows:

The Clerk: Please state your full name.

A. My name is Irene Carrier.

Mr. Licht: Will you speak up so we can hear you over [12] here, Mrs. Carrier.

Mr. W. E. Catlin: If your Honor please, I would like to ask permission of the court to address the court on a motion at this time.

The Court: Yes, sir.

Mr. W. E. Catlin: At this time, your Honor, the defendant moves that the complaint of the plaintiff

(Testimony of Irene M. Carrier.)

be dismissed as being defective in the following respects:

That, first, the publication alleged in plaintiff's complaint is not defamatory; that second, it being not defamatory on its face, under the code it requires an explanation or innuendo by pleading along with special damages; that in the one particular in which an innuendo is pleaded the complaint upon its face reveals that the matter is true. This, your Honor, is the matter of the divorce and marital difficulty. The plaintiff states in the complaint that the business was received as a result of a divorce, a decree.

Under California Civil Code 45A, you must allege and prove special damages as a proximate result of defamation which is not defamatory on its face per se.

In this case the only wording that the plaintiff complains of is (1) "That by innuendo the reports impute to plaintiff the securing of said business by coercion and duress." Plaintiff admits that the business was obtained by a decree of court and the report states only that the business [13] was obtained through financial difficulty. (2) "that plaintiff had no previous retail furniture experience". This on its face is not defamation. (3) "that plaintiff employed a manager to operate said business". This again upon its face is not defamatory, as some of the best and finest businesses in the United States are run by managers for people. (4) "that 1954 payments were slow". This again is not defamatory on its face.

(Testimony of Irene M. Carrier.)

And "that the bulk of plaintiff's purchases are being made on a C.O.D. basis." This again without explanation is not defamatory.

These statements being read by any individual, not versed in technical detail but as is required by our law, the normal, ordinary, reasonable man, do not indicate defamatory nature of any kind.

And the complaint does not plead an alleged special damages of any nature.

Second, the complaint upon its face and by virtue of the two reports made a part thereof, indicates that Lyon Furniture Mercantile Agency is a credit reporting agency, and as such, by its very nature, and by the material contained therein falls within the purview of the qualified privilege granted mercantile agencies of this kind, both by the Civil Code 47, Sub. 3 and by cases in the State of California.

Section 48 of the Civil Code states that in this type of defamatory action malice is not presumed as it is in the other defamatory actions by the mere fact of publication but must be alleged in detail. And in this particular complaint, they merely say that the defendant did this with malice.

If your Honor please, the complaint shows that the Lyon Mercantile Agency is a credit reporting agency and as such is of the peculiar value to business that it has been bestowed with a qualified privilege in case of error, as long as there is no malice, personal ill will and malice involved.

This must be actual malice. As far as the complaint states upon its face, this actual malice is not

(Testimony of Irene M. Carrier.)

alleged and therefore, we urge that it cannot be proved.

Accordingly, we move that the complaint be dismissed at this time.

The Court: Well, I will deny the motion at this time. You may proceed to examine the witness.

Direct Examination

Q. (By Mr. Licht): Would you state your name please. A. Irene Carrier.

Q. Can you speak a little louder, please, so we can hear you. A. Irene Carrier.

Q. Where do you live, Mrs. Carrier? [15]

A. Phoenix, Arizona.

Q. Are you engaged in business?

A. Yes, I am in business.

Q. What is the name of the business?

A. The name of my store is called Wishmaker House.

Q. What business is that?

A. It is furniture and decorating, retail.

Q. How long have you been engaged in Phoenix in business?

A. Since 1946, but I didn't—I have been in the furniture business since 1948.

Q. I see. And what was the business called at that time? A. Carrier's Furniture.

Q. And how long was it called Carrier's Furniture?

A. It was called Carrier's Furniture from July, 1946.

(Testimony of Irene M. Carrier.)

Q. Until when?

A. Until I changed the name when the lease expired and moved, which would be January of '54.

Mr. W. E. Catlin: I am sorry, counsel. I really can't hear her.

The Court: We have the air conditioner here which you have to compete with.

Mr. Licht: Speak up, please.

The Witness: Yes. [16]

Q. (By Mr. Licht): When did you first start working yourself at Carrier's Furniture?

A. I think May of 1948 I went into that store.

Q. And who else was in the store besides——

A. My ex-husband.

Q. And his name?

A. Frank; Frank Carrier.

Q. Frank Carrier. Did you and Mr. Carrier own this store? A. Yes.

Q. What was your job or position in the store say from 1948 to 1953?

A. Just about a little of everything. I took care of—I did most of the buying. The store had never made money until I went there. I got in and bought some decent furniture, started an advertising program, did a lot of mail advertising, to get people in.

Q. And were you actively engaged?

A. And sold and decorated.

Q. Were you working full time during that period, in the store?

A. Yes, I was. I was working twelve hours a day most of the time.

(Testimony of Irene M. Carrier.)

Q. Did that continue until March or April, 1953? A. Yes, it did. [17]

Q. And will you tell the court what happened there at that time that was of significance.

A. In April 1953?

Q. Yes.

A. I hate to go back and live all this over again.

The Court: Well, you have to.

Mr. Licht: Please.

The Witness: In April 1953, about the 10th of April, Mr. Carrier went on this cruise.

Q. (By Mr. Licht): Did he tell you why he was going on this cruise?

A. His health was very poor. He has a very wealthy brother-in-law and his brother-in-law had bought a cruiser and he was invited to go on this cruise throughout the Bahamas.

Mr. W. E. Catlin: I object, your Honor.

The Court: Well, she is just giving the background a little bit. I realize that statement doesn't help. She just wants to explain.

Mr. Licht: I just want her to explain the background of material facts.

The Court: That is right.

Q. (By Mr. Licht): What happened next?

A. He went on this cruise. There was no question of his not coming back in my mind when he left. [18]

Q. When he left, what was the next thing that happened?

A. Well then, a young credit manager from Ari-

(Testimony of Irene M. Carrier.)

zona Hardware called on me. I was with a customer. He had to wait quite a while. Finally I got around to him. He introduced himself. His name was Mr. Martin, and here we had about 7,500, 7,700——

Mr. W. E. Catlin: I object, your Honor, this is all hearsay.

The Court: Well, as to that I think I will have you lead her a little bit, Mr. Licht.

Mr. Licht: All right.

The Court: Some of that is hearsay there, but we have got the background.

Q. (By Mr. Licht): The day following when your husband left, somebody called on you from Arizona Hardware Company, is that correct?

A. Yes. I will put it bluntly and quickly for you. Phoenix is small. And the news got around very quickly that Frank Carrier had gone on a cruise. So they just simply all started folding in.

Q. And prior to that time were you aware of what the financial condition was of Carrier Furniture Company?

A. No. I paid no attention to the books at Carrier Furniture.

Q. Whose job was that? [19]

A. My husband took care of it, and he had a part time accountant, a bookkeeper.

Q. All right. Now, after you had this conversation with this man from Arizona Hardware, what happened next?

A. I talked with him and I told him I had a

(Testimony of Irene M. Carrier.)

feeling I was in a mess and I told him, I believe it was on Thursday, I said, "Go back and tell Mr. Jones," he is the manager of Arizona Hardware, "that as quickly as I can I will get some type of financial statement together for you people and I will be over the first of the week."

Mr. Lindenbaum: I object. This is all hearsay, your Honor.

The Court: I will consider it as partly hearsay. She is trying to give the background. We will get into the real merits of the litigation. There is no jury here. I will have to eliminate the portion that is hearsay.

Q. (By Mr. Licht): And then did you proceed to get a financial statement together?

A. A friend came in and did the best he could and got a financial statement together for me.

Q. That was your accountant?

A. No. I had no accountant at that time.

Q. Who was the man?

A. He was a man in Phoenix. Well, how I knew him, he had been coming in on his free time and setting up a [20] perpetual inventory control for me, and he had had years and years of credit experience. He had been credit manager with Doris Hyman over there for several years and with Paul Sale out in Mesa.

Q. At any rate, you had a statement prepared which gave you a list of whoever your creditors were at that time, is that correct? A. Yes.

(Testimony of Irene M. Carrier.)

Q. Do you remember approximately how many creditors were included on that list?

A. A good 60.

(A short intermission.)

Q. (By Mr. Licht): Let me show you a series of six or eight pages on the stationery of Carrier's Furniture on East Van Buren Street, Phoenix, and ask you to examine it and tell me whether or not that is a list of the creditors that existed at that time. A. Yes.

Mr. Licht: Could I have it marked for identification at this time.

The Clerk: Plaintiff's Exhibit No. 1.

The Court: Plaintiff's Exhibit No. 1.

Mr. Licht: No. 1 for identification, your Honor.

The Court: Yes. [21]

(Said document, consisting of eight pages, was marked Plaintiff's Exhibit No. 1 for identification.)

Q. (By Mr. Licht): Now, what did you do next, Mrs. Carrier, with respect to the operation of this business?

A. I took that credit report Monday to Arizona Hardware. I sat down with their manager and I said, "This is the way it is." "Now, how am I going to pay these bills? What is the best way I can go about it, Len?" I knew him. And we worked it out, at my own suggestion that I would go on a C.O.D. basis and that I would knock that indebtedness down just as quickly as I could.

From there I went over to General Electric Sup-

(Testimony of Irene M. Carrier.)

ply, who was the next big creditor. They did not call me. I thought I would go first. I went over there and talked, and J. Paxton I met, their credit manager, and we worked out the same type of arrangement, I automatically went on C.O.D. and I would pay them just as quickly as money started coming in.

Q. What did you do in an effort to get some money in quickly to start payments?

A. Business was very poor. We had a sale toward the end of April. Then we had a big sale in early June.

Q. And what did you do with the funds you realized from these two sales?

A. Paid off as much as I could and kept the doors open.

Q. You applied that to the indebtedness? [22]

A. That's right, the first sale. The second sale, I had around \$6,000 which I put in escrow with Mr. Hill's organization in Phoenix.

Q. Who is Mr. Hill?

A. Mr. Hill heads our wholesale-retail credit organization over there. It is a national hookup.

Q. And by that time you had made some arrangements with him, is that correct?

A. Well, in the meantime we had called a credit meeting.

Mr. Lindenbaum: May I address the court?

The Court: Yes.

Mr. Lindenbaum: I would respectfully move to strike out all this testimony and I object to this line

(Testimony of Irene M. Carrier.)

of testimony on the ground that it is hearsay and it certainly is not binding on the defendant. She has testified to conversations which are immaterial to the issues in this case.

The Court: Well, I will deny the motion to strike. There is not any jury here and she is trying to give us the background. We will get into the merits of the case.

Mr. Lindenbaum: I respectfully except.

The Court: Yes.

Q. (By Mr. Licht): So that anyway you had made certain arrangements with Mr. Hill's organization, is that correct?

A. During the early part of June, around the 1st of [23] June, through J. Paxton, who was credit manager for General Electric Supply over there, a wholesale credit meeting was called for me.

Q. And did you go to that meeting?

A. Yes.

Q. And what action did you take as a result of that meeting?

A. In the meantime, Mr. Carrier had come back to Phoenix and when he came back he had a certain amount of Kennecott Copper stock, which he had at the Valley National Bank, he had borrowed money on it, and he was invited by Mr. Paxton to be at that meeting.

Q. At any rate, Mrs. Carrier, at the meeting the problems of Carrier Furniture were discussed, were they not, and as a result of that meeting what did you do?

(Testimony of Irene M. Carrier.)

A. Continued to fight away, Mr. Licht, and keep my doors open. And Mr. Carrier, during these meetings, promised to put up his stock.

Q. I am going to show you a document dated August 27, 1953 and ask you to examine it and to see if that is a list of the creditors and the amounts due at the time of that meeting.

A. That is right.

Mr. Licht: I offer that for identification as plaintiff's exhibit next in order. [24]

The Clerk: Plaintiff's Exhibit No. 2 for identification.

The Court: No. 2.

(Said document, consisting of four pages, was marked Plaintiff's Exhibit No. 2 for identification.)

Q. (By Mr. Licht): And following that, what next occurred, Mrs. Carrier, with respect to the payment of these claims?

A. Well, it was most difficult for four long months, because Mr. Carrier promised to put up \$10,000, to the creditors in Phoenix early in June, at the first credit meeting, and he stalled them week after week, he stalled until finally, Wholesalers over there slapped a garnishee on this stock in July. We never received the money until around about the end of September when this credit agreement that you have was finally written up. That is when we received his money, but he had promised it early in June.

(Testimony of Irene M. Carrier.)

Q. And during that period was he active in the store at all?

A. No. He never came. I had an injunction against his coming into the store.

Q. And you actively operated the store yourself?

A. Yes.

Q. What then followed after this arrangement, what did you do next?

A. Well, we sweat the summer out. It was horrible. [25]

Q. The summer of 1953?

A. Yes, '53. My lease was expiring in December. I knew I either had to find something else or I had to just walk out, and there was a heavy inventory and there was a heavy indebtedness.

Q. Will you give the court your best recollection of how much the indebtedness was at that time?

A. By the time we made these payments in October, I think we had reduced that down to about \$21,000.

Q. How much was it at the time you took over the business?

A. It was \$49,000 when he left.

Q. So that between April when you took it over and the fall of 1953, you reduced to \$21,000, is that correct?

A. Approximately. I don't have the accurate figures.

Q. All right. Well, I believe Mr. Hill does have those figures, doesn't he? A. Yes.

Mr. W. E. Catlin: Objection.

(Testimony of Irene M. Carrier.)

Mr. Lindenbaum: Objection, your Honor. May I object to counsel leading the witness and I move to strike the conclusion.

Mr. Licht: I will withdraw that question.

The Court: He has withdrawn the question.

Mr. Lindenbaum: What? [26]

The Court: He has withdrawn the question.

Q. (By Mr. Licht): Well then, you did move the store, is that correct, is that what you say?

A. Yes.

Q. When did you move the store?

A. The lease was expiring in December of '53, and I looked and I looked and I didn't have any place to turn, and finally had the opportunity of trading the equity in my home for a five room little house on East Camelback which had been zoned for business.

Q. Did you do that?

A. I did that, and then I tried and I tried in the City of Phoenix to raise \$2,500 in order to make a store out of it. Nobody talked to me. And finally my brother-in-law in California signed that FHA mortgage and I made a store out of it.

Mr. Lindenbaum: I move to strike out the answer as not involved in the issues in this case, as calling for a conclusion and as being incompetent.

The Court: Well, I will deny the motion to strike. I will let it remain. Some portion of it is, but she is trying to be explanatory, and I don't think it hurts anything. There isn't any jury here. I think Mr. Licht has almost covered it all in the opening

(Testimony of Irene M. Carrier.)

statement which she is relating and some of it is hearsay, and that part of it which is [27] hearsay the court will just have to put out of his mind. I think it is faster than to go back and strike out that portion, so I will just let it remain. So for the purpose of the record I will deny the motion.

Q. (By Mr. Licht): Did you then move your store? A. Yes, we did.

Q. When was that?

A. That would be January of 1954.

Q. Is the store still located at that same place?

A. Yes, it is.

Q. What next happened with respect to the payment of these claims?

A. As we made a big payment in October—in November of '53, this credit agreement was also drawn up and signed at the end of my divorce which was the end of September, and I entered into a credit agreement with my creditors that I would pay that indebtedness off at a thousand dollars a month, which I tried to do, I think I made three payments, but I couldn't do it, I couldn't do it because I was not on a C.O.D. basis. I want the court correct on that. I protected my manufacturers and I automatically put myself on a C.B.D. and what happened.

I had about five thousand dollars' worth of working capital. I would order things. And I would say, "Let me know when you are ready to ship and my check will be coming [28] right away." They would get my check. They would hold my check

(Testimony of Irene M. Carrier.)

three and four and five months before I would get merchandise.

Mr. Lindenbaum: Your Honor, may I ask that the time be fixed in connection with the holding of the check for three, four, five months?

The Witness: My attorney has files there, your Honor.

The Court: Yes.

Q. (By Mr. Licht): Would you give the court some specific instances when that happened and relate it to a particular time in question.

A. Oh, Sanford Furniture held money on me.

Q. When? A. During that interval.

Q. Would that be 1953?

A. We are getting into '54. Sanford Furniture held money in 1954 into 1955, until I stopped doing business with them.

Jamestown Table in New York City, in July of 1954 took something like it was between five and six hundred as I recall in advance and said they were ready to ship, and took three months and I got a letter from an attorney and then I finally got Marshall Field rejects when I finally got my delivery.

Q. Now, in January 1954 you then moved the store and [29] you said you had an arrangement where you were to pay a thousand dollars a month, is that correct, which you did for three months. Then, what did you do at the end of that three months period?

A. Well, I think we made our March payment

(Testimony of Irene M. Carrier.)

and we were just being squeezed, we just couldn't do it, so we wrote a letter to the industry and asked for a moratorium on that indebtedness, which was given to me.

Q. How long a moratorium did you get?

A. Three months.

Q. At the end of that three month period, then, did you commence making payments again?

A. Then we get into summer and I called Mr. Hill up in late June. I made a thousand dollar payment as I recall it after that. And then I called Mr. Hill up in June, late June. A payment was due by the 14th of July and I said to him, "Frank, I simply can't make a thousand dollar a month payment during this heat. I can send you five hundred."

Q. You said that would be in 1954?

A. That would be in 1954.

Q. That would be in the summer of 1954?

A. Correct.

Q. Go on. You offered to make a payment of \$500.

A. And he said, "Irene, that will be all right. You are doing the best you can do. I am sure it will be all right." [30]

Q. Did you send the \$500? A. Yes, I did.

Q. What happened next?

A. I came to the San Francisco market. I returned to Phoenix, I was only there a few days. And Friday of that week, I had two sheriff's deputies come in with an execution for three judgments

(Testimony of Irene M. Carrier.)

against me—Sandhill Furniture, Dixie and Englander Mattress.

Q. And who was handling those claims for the claimants, if you know?

A. Those were claims that were handed over to Lyon's Mercantile, and they were represented by their attorney over there, their attorney, collection attorney is Mr. Wilson, and what happened, Mr. Wilson turned back the payment from Mr. Hill's organization and tried to move in.

Mr. Lindenbaum: I object. This is purely hearsay.

The Witness: That is the truth.

The Court: Yes; I mean I think I will strike that last statement out. Mr. Licht, you are getting into a little hearsay, you understand that.

Mr. Licht: Yes, your Honor.

The Court: I have been ruling with you, but I can't go too far. What they object to is that sometimes you make statements that are hearsay. You do not understand that, probably. It is a legal term.

The Witness: No, I don't. I am doing the best I can.

The Court: I know you are doing the best you can and I have to act legally. You don't know legal terms. I will ask Mr. Licht to direct you.

Mr. Licht: I will, your Honor.

Well, while we are looking for these papers, Mrs. Carrier—

The Court: We can stop and take the morning

(Testimony of Irene M. Carrier.)

recess at this time. You have made pretty good time.

Mr. Lindenbaum: If your Honor please, may I ask to speak——

The Court: Certainly.

Mr. Lindenbaum: My associate Mr. Catlin waived the opening. I think it would only be fair to the defendant if we are permitted to just take two or three minutes.

The Court: At this time?

Mr. Lindenbaum: At this time.

The Court: All right. Do you want to step down, Mrs. Carrier. We will take the morning recess but we will let the defense counsel make the defense statement at this time.

Mr. Lindenbaum: If your Honor please, we will show——

The Court: I understood he was going to wait and make it at the beginning of the defense, but you think you better alert the court right away?

Mr. Lindenbaum: Yes.

The Court: He didn't waive it. I thought he just [32] reserved it.

Mr. W. E. Catlin: That is right.

Mr. Lindenbaum: I would like to call the court's attention to the fact that this defendant, the Lyon Furniture Mercantile Agency, was established in 1876 and has offices in the principal cities of the United States and publishes reports on hundreds and thousands of dealers throughout the United States.

(Testimony of Irene M. Carrier.)

I would like to call to the court's attention further the fact that in our report we will show there was no personal feeling in connection with this individual; that we exerted every reasonable caution that our subscribers would require of us; that our only duty was to the subscribers and not to this plaintiff, and that we will show that Mrs. Carrier did pay her bills exceedingly slow; that she was on a C.O.D. basis, and that anything we said of her in our report was substantially true.

That is all.

The Court: We will take a short morning recess.

Mr. Licht: Thank you, your Honor.

(Recess.)

The Court: You may proceed.

Q. (By Mr. Licht): I believe when we recessed, Mrs. Carrier, you had testified something about a moratorium of three months, is that correct? [33]

A. Yes.

Q. And that thereafter you had made a payment to this credit association of some \$500, is that correct? A. That is right.

Q. Instead of a thousand dollars as called for. Then you said something about going to San Francisco and coming back?

A. Yes. I was back two or three days when these two sheriff's deputies came in with an execution.

Q. And do you know what manufacturers they represented?

A. Yes. It was Englander Mattress Company, Dixie Furniture and Sandhill Furniture.

(Testimony of Irene M. Carrier.)

Q. And what did you do?

A. What did I do? Well, for the first time in 15 months, I exploded. I had a good crying jag.

Q. What did you do then?

A. My attorney was in court.

Mr. Lindenbaum: Your Honor, I move to strike out that answer as a conclusion.

The Court: All right. It may go out.

Mr. Lindenbaum: Thank you.

A. My attorney was in court. It took us a little while to get him. We finally got him. He in turn got in touch with Mr. Wilson's office and talked with Mr. Waddell.

Mr. W. E. Catlin: Objection as hearsay. [34]

Mr. Licht: Just testify to what you did, Mrs. Carrier.

The Court: Yes, I will sustain the objection.

Mr. Licht: Not as to what somebody else did.

Q. You got in touch with your attorney, is that correct? A. Yes.

Q. What did you do next? Did you make then any kind of an offer? A. No.

Q. With respect to their claims?

A. Mr. Waddell told me over the telephone—

Mr. Lindenbaum: I object to her testifying to what someone else told her over the telephone, as being pure hearsay.

The Witness: I have to tell what happened.

The Court: Well, I will let her go ahead. I will overrule the objection. Go ahead and answer. All right, go ahead.

(Testimony of Irene M. Carrier.)

Mr. Lindenbaum: We respectfully accept.

A. Mr. Waddell told me over the telephone if I would personally——

Q. (By Mr. Licht): Who is Mr. Waddell?

A. Mr. Waddell in Mr. Wilson's office, his assistant I assume, he told me over the telephone if I would personally put in the mail a check for the difference that was coming to [35] Lyons Mercantile, they got that pro rata share out of that five hundred, but if I would put up the difference on the other five hundred, it would be all right, which I did.

Q. What happened then?

A. Tuesday the sheriff's deputies were back again. Mr. Wilson turned back Mr. Hill's check and he refused my check.

Q. What did you do next?

A. Mr. Wilson told my attorney that if——

Mr. Licht: Please don't, Mrs. Carrier——

Mr. Lindenbaum: If your Honor please——

The Court: That may go out.

Mr. Lindenbaum: What?

The Court: That statement may go out. He is going to ask another question.

Mr. Licht: I will ask you another question. I want just what you did.

Q. After these checks were turned back, what did you do?

A. I phoned the three manufacturers, the three whom I am talking about.

Q. You phoned them directly, is that correct?

(Testimony of Irene M. Carrier.)

A. Yes.

Q. And what happened as a result of that conference with them? [36]

A. Englander Mattress, I talked with Mr. Hirsh-meyer in Chicago.

Q. He is with Englander Mattress?

A. He is the credit manager for Englander.

Q. Just tell me what happened after the conversation?

A. I called him and they withdrew. They would have no part of it.

Q. At any rate, the sheriffs left?

Mr. Lindenbaum: I respectfully move to strike out that answer as being absolutely a conclusion.

The Witness: I have to tell the truth.

Mr. Lindenbaum: What she says someone told her. We haven't got an opportunity to rebut that.

The Court: All right. That part may go out.

The Witness: All right, Mr. Licht. Englander withdrew.

Q. (By Mr. Licht): At any rate, the sheriffs left, is that right? A. Yes.

Q. After your conversation. And following that, what did you do next?

A. Went ahead and tried to run my business.

Q. Now, at the time that these claims were being handled by Mr. Wilson that you mentioned, approximately how much was due to the group that he represented, at that time, now? [37]

A. At that time, I think about \$1,500.

(Testimony of Irene M. Carrier.)

Q. How much was due in total to all creditors at that time?

A. Probably between fifteen and sixteen thousand dollars.

Q. Now, what did you next do, if anything, with respect to just these claims being handled by Mr. Wilson?

A. I didn't do anything. I just continued my business.

Q. Did you subsequently make them some sort of an offer with respect to their claims?

Mr. Lindenbaum: Your Honor, I object to the question. The witness has already answered it. She said, "I didn't do anything."

The Witness: At that time——

The Court: All right, I will sustain the objection. Start again, Mr. Licht.

Q. (By Mr. Licht): Well, what next happened, if anything, with respect to these claims?

A. At that time my attorney was going on his vacation, and through him we offered fifty cents on the dollar on those \$1,400 claims that Lyon's Mercantile were holding, which they refused.

Mr. Lindenbaum: Your Honor, again I have to move respectfully to strike out that answer. She refers to "they". We don't know who she is talking about. [38]

The Court: I will let it remain. You can cross examine her on it and get the details then.

Mr. Licht: I will ask her, your Honor.

(Testimony of Irene M. Carrier.)

Q. To whom was this offer conveyed, so far as you know?

A. To Mr. Wilson. Mr. Linsenmeyer made the offer.

Q. And what did you do next with respect to this \$1,400 in claims?

A. In the meantime I went along for two or three weeks running my business. He was gone. He returns from his vacation and he phones me, and he had a letter on his desk that he read to me, from Mr. Wilson.

Mr. Licht: Please do not go into that. All I want to know is—let us follow along. With respect to the payment of these \$1,400 claims, now, which if any of those did you pay in full?

A. In a few weeks there we paid off the Sandhill and the Dixie judgment in full.

Q. Within a few weeks after this time the sheriff was in? A. Yes.

Q. And how much approximately did that then leave of this group that were handled by Mr. Wilson?

A. Probably around four or five hundred dollars.

Q. And what did you do with respect to those four or [39] five hundred dollars?

A. Then, most of those were settled for fifty cents on the dollar there in the fall, about \$400 was settled for around \$200. That is close.

Q. Now, with the exception of this, then, that \$400 which was settled for \$200, did you from the

(Testimony of Irene M. Carrier.)

time you took over this business until the end of '54 at this point make any compromise settlement with any creditors?

A. No, I did not, other than that.

Q. And had you to that time paid each and all of the creditors their pro rata share in full?

A. Just as much as I could.

Q. And how much then was left owing after you had settled with this group represented by Mr. Wilson?

A. I can't remember all those figures, but I would say then we probably had left about \$12,000, somewhere in there. Mr. Hill will have all those figures.

Q. With respect to this \$12,000, now, what did you do as to that?

A. Went on trying to pay until finally in about the end of January, which would be in 1955, wouldn't it——

Q. Yes.

A. ——we offered 3,000—I had gotten that indebtedness down to \$9,700 by then, and we did offer, through Mr. Hill's organization, a \$3,000 settlement, all of which was [40] accepted except for three people and I have forgotten their names, that was about \$700. They wanted a hundred cents on their dollar, and over a period of time I made those payments to Mr. Hill and they were paid their hundred cents on their dollar.

Q. Then, is it your testimony that between April of 1953, when you first took over complete operation

(Testimony of Irene M. Carrier.)

of the business, and January or February of 1955, you had paid all of your creditors in full with the exception of one group which got a \$200 balance instead of \$400, and some \$6,000 for the general overall creditors?

Mr. Lindenbaum: One minute, please. I object to the question on the ground that there are some statements made there that this witness has not testified to. That creditors were paid in full is one. She has not testified that creditors have been paid in full.

Mr. Licht: I believe that is what the question was, your Honor.

The Court: Well, I will let it remain. I will overrule the objection.

Mr. Licht: Will you answer the question.

The Witness: I am sorry. Would you repeat it for me, please?

Mr. Licht: Will you read it, Mr. Reporter.

(Pending question read by the reporter.)

The Witness: I don't understand your wording on that.

Mr. Licht: All right. I will try to change the question.

Q. When you took over in April, there was some \$49,000 in claims, is that correct?

A. That is true.

Q. How much of that obligation had you paid by January of 1955?

A. It was paid down to about \$9,700.

Q. And that amount, then, was settled how?

(Testimony of Irene M. Carrier.)

A. For \$3,000, with the exception of about \$700 in there where three parties wanted a hundred cents on their dollar, and they were later paid.

Q. Now, since you have been operating the business, have you employed a manager?

A. Never.

Q. When was the last time that Carrier Furniture Company had a manager, if you know?

A. Mr. Carrier had a manager whom he let go, I would say about January of '52 he let him go.

Q. And after that, there was never a manager?

A. No.

Q. Did you in August 1954 offer creditors a 50 per cent compromise settlement both on open accounts and those accounts that were in judgment?

A. No, I did not. [42]

Q. Mrs. Carrier, do you have any way of estimating—of course I just want to know if you have any way of estimating the amount of business that you have been unable to get since March of 1954 because of your inability to get credit?

A. The best way I could give you that is to——

Q. Well, do you have any way of estimating it?

A. Yes.

Q. Now, will you please tell me what way you have of estimating that, before you give me any figures.

Mr. Lindenbaum: I object to the question as calling for speculation and operation of the witness's mind.

The Court: Well, I will overrule the objection.

(Testimony of Irene M. Carrier.)

Mr. Lindenbaum: I respectfully except.

Mr. Licht: Now answer my question, please. What method have you for estimating that?

A. I would go back and compare a comparable inventory on East Van Buren and what we did the first year I was there with a less—with about comparable inventory, and when I went into that store in May, there was less than \$8,000 inventory.

Q. In May of what year is that, now?

A. Either '48 or '49, and when we closed our books, my husband said we net \$19,000. We built that volume up. We were keeping the overhead low and we were doing business, and doing a nice business.

Q. And at that time, before 1953, had you been purchasing generally on an open account?

A. Oh, always.

Q. And as a matter of fact——

The Witness: Nobody had turned me down.

Q. Now, using your best estimate, based upon your knowledge and experience in Carrier Furniture before that, will you tell the court your best minimum of what amount of business you lost as a result of not getting credit?

Mr. Lindenbaum: I respectfully object to the question as being incompetent.

The Court: I will overrule the objection.

Mr. Lindenbaum: We respectfully except.

A. I would say, Mr. Licht, with the traffic that we have had and the way the store is liked and my personal reputation in the city, at a minimum that

(Testimony of Irene M. Carrier.)

store should be netting twelve to fifteen thousand a year.

Q. (By Mr. Licht): How much, in fact, have you been netting during the last few years?

A. We have been running in the red.

Mr. Lindenbaum: I again renew my objection and move to strike out the answer as not binding on the defendant and as not being the best evidence. [44]

The Court: No. I will deny the motion to strike.

Mr. Lindenbaum: We respectfully except.

Q. (By Mr. Licht): Could you tell me a little more specifically, if you can, on what you base this, in other words, do you have any specific references that you can think of in cases where you know you lost business? A. Yes, very definitely.

Q. Will you please tell me some?

A. Time and time again. My business mostly is a referral business and people come to me because a friend has sent them, and I can't get them things. A specific incident just within the last few months—I will give you two. I did Mr. Vincent's house over there and he is executive vice president for the Bank of Douglas, at the head office. I had done a bank job previously for that, downtown for them, and then I did his house. Every bit of buying that he possibly could do he wanted to do through me and he did it through me with the exception of a Baker desk he bought and paid \$400 for at Doris Hyman's. I cannot go out and buy Baker. I can't go out and buy Widdicomb.

(Testimony of Irene M. Carrier.)

Mr. Lindenbaum: I move to strike the answer.

The Court: Well, the fact that she cannot buy from Baker and Widdicomb, I will let that portion go out. The rest will remain.

A. Recently I have had several of their personal friends [45] come in to me because they are very well known in the state, wanting me to go ahead and take over, but I can't get things.

Q. (By Mr. Licht): In response to inquiries, Mrs. Carrier, that you made to certain manufacturers for purchases, did you receive responses from them stating why they wouldn't ship to you?

A. Some. Some, no.

Q. Do you recall offhand some that were mentioned to you, the question of not being able to ship because of——

A. Yes. We will take Sanford Furniture who had quite a bit of business from me.

Mr. Lindenbaum: Your Honor, I did not hear that question.

Mr. Licht: I am sorry.

(Mr. Licht shows documents to defendant's attorneys.)

Q. (By Mr. Licht): Now Mrs. Carrier, I am going to show you a series of five letters, two of them on the stationery of Sanford Furniture Company, one on the stationery of Caro & Upright, one on Fine Arts Furniture Manufacturing Company's and one on Charm House, Inc., and ask you if those are letters you received in response to certain orders that you had sent to those firms?

(Testimony of Irene M. Carrier.)

A. That is right.

Mr. Licht: Will you answer so they can hear.
Are these the letters? [46] A. Yes.

Mr. Licht: I offer those as one exhibit, your Honor.

Mr. Lindenbaum: If your Honor please, I object on the ground they are not the best evidence, they are hearsay and we have no opportunity to cross examine.

Mr. Licht: Your Honor, these are letters received in the general course of business by Mrs. Carrier.

The Court: I will let them be received. I overrule the objection.

Mr. Lindenbaum: I respectfully except to the ruling.

The Court: Yes. I overrule the objection.

The Clerk: Plaintiff's Exhibit No. 3, in evidence.

(Said documents were received in evidence and marked as Plaintiff's Exhibit No. 3.)

Mr. Licht: I haven't anything further, your Honor. You can cross examine.

Cross Examination

Q. (By Mr. W. E. Catlin): Mrs. Carrier, I believe you stated under direct examination that at the time you took over Carrier's Furniture, now Wishmaker House, you had liabilities of approximately \$49,000, is that correct?

A. Yes, that is true.

(Testimony of Irene M. Carrier.)

Q. Now, Mrs. Carrier, what were the assets of Carrier's Furniture at the same time? [47]

A. As nearly as we could judge, around \$70,000 worth of inventory, plus our paid up equipment.

Q. In other words, you not only took over \$49,000 in liabilities but \$70,000 in assets?

A. That is right.

Q. Now, at the time you took over the business, in respect to these liabilities, what was the nature of the \$49,000 liabilities, were they trade accounts?

A. Most of them.

Q. And when had these been incurred, if you know?

A. Oh, some of them went back to December.

Q. December of what year

A. Well, that would be '50—ending '52, wouldn't it?

Q. '52, in other words, they were approximately six months old at that time?

A. They weren't six months. That is three months, January, February, March to April 10, a little over three months.

Q. I might be in error, Mrs. Carrier. I understood you to say you took it over in June.

A. I had to take over on the 10th of April, from the minute that I was left there stranded.

Q. I erred. The 10th of April. Now, Mrs. Carrier, in this \$49,000 of liabilities, do you recall what were the original terms on which the merchandise was sold to you? [48]

A. As any manufacturer sells, two per cent ten,

(Testimony of Irene M. Carrier.)

end of month some of them give. Very few factories will pressure you very much if you are 60 days, if you are doing a volume of business with them.

Q. Two per cent ten, net 30, is that correct?

A. Well, they work differently.

Q. Some of them were two per cent, ten, net 30. What were the others, as nearly as you can recall?

A. Well, that is just about how the industry does business. Some manufacturers, for instance, when they say "two per cent ten" they will give you until the 10th of the following month on an invoice and take your discount. Some want their discount within ten days. There are very few factories, I say if you are doing business with them, they don't pressure you on an account even if it is 60 days. They might write you a nice little letter saying you owe it.

Q. I see. But, in any event at least a portion of this \$49,000 would have been beyond the original terms, is that correct?

A. Yes, I would say so.

Q. Could you give me an estimate as to how much was beyond the original terms of sale, at that time?

A. No, I can't. There was only one invoice that I can recall that went back into December, and that was a part invoice from D. N. & E. Walter. However, we were quarreling [49] about that invoice and that invoice was not being paid on purpose.

(Testimony of Irene M. Carrier.)

Q. Were these debts paid in 1953, all of them?

A. Just as much as I could, Mr. Catlin.

Q. Were they all paid in 1954, the \$49,000?

A. As much as I could pay.

Q. Were they all paid, do you recall?

A. No. The settlement was finally made in about February of 1955.

Q. In other words, some of these obligations which you took over, which were delinquent under the original terms of sale at the time you took over the business, were not actually cleared until 1955?

A. That is right.

Q. Now Mrs. Carrier, do you know the type of business that Lyon Furniture Mercantile Agency is engaged in? A. I used to think I did.

Mr. W. E. Catlin: Well, I move to strike that as non-responsive.

The Court: Yes. That may go out.

Q. (By Mr. W. E. Catlin): Do you know, Mrs. Carrier, the type of business the Lyon Furniture Mercantile Agency is engaged in, of your own knowledge? A. Yes. It's credit.

Q. Credit. By that you mean that they write credit reports? [50]

A. They are a credit reporting agency, as far as I know, and a collection agency.

Q. It is a credit reporting agency?

A. And a collection agency.

Q. And are you at all familiar in your dealings as a retail furniture businesswoman with the methods under which they operate? By this I specifically

(Testimony of Irene M. Carrier.)

mean that they have subscribers to their business?

A. I know you have subscribers, yes.

Q. And do you also know of your own knowledge that to get a report from the Lyon Company you must be a subscriber to their services?

A. That is what I am told.

Q. Mrs. Carrier, do you know Adalaide J. Lyon?

A. Who?

Q. Adalaide J. Lyon.

A. Never heard of him.

Q. Do you know Fred Eshelman?

A. Never heard of him.

Q. Clare Nevers?

A. Never heard of him.

Q. John Graham? A. No.

The Court: A little louder. [51]

The Witness: No.

Q. (By Mr. W. E. Catlin): Frank Gaffney?

A. No.

Q. Margaret Lyon? A. No.

Q. Or John J. Sigerson?

A. You mean Sigerson?

Q. Yes.

A. I met Mr. Sigerson a year ago when he called on me.

Q. What was the date of that meeting?

A. It was Decoration Day, a year ago.

Q. Had you ever met him before that time?

A. No.

Q. Had you ever communicated with Mr. Siger-

(Testimony of Irene M. Carrier.)

son or any of the members of the Lyon Company that I have just previously named?

A. I have tried to communicate with Lyon's Mercantile here in Los Angeles but I don't—

Q. No. I am limiting my question to the people whose names I have given you, at this time.

A. Not with these people.

Q. You had no dealings with them at all—

A. No.

Q. —until you met Mr. Sigerson last Decoration Day?

A. Not to my knowledge. I might have met some of them [52] and not know who they are.

Q. And you never met—

A. Excuse me a minute.

Q. Yes.

A. Mr. Sigerson brought somebody with him, a year ago from Chicago, but I don't recall his name. It might be on that list.

Q. No, ma'am. Did you ever meet and discuss your business with any Lyon Furniture Mercantile Agency personnel prior to the issuance of the first report of which you complain in your complaint?

A. That report that we have is dated 1954, is it not?

Q. Yes, ma'am.

A. In March of 1954—I have copies of a letter there—I sent you people a financial statement and I asked for an interview in Phoenix.

Q. All right, but Mrs. Carrier, did you ever have any dealings with any of the Lyon personnel, either

(Testimony of Irene M. Carrier.)

with members of the firm or an employee, actually sit down, write and receive an answer, have any discussion with them of any nature prior to the publication of the report?

A. I don't know just when your report is dated. But in April of 1955, it would be——

Q. No. I am speaking of prior to the date of the first report, which is March 23, 1954. [53]

A. I got to stop and think a minute. The only contact I had with Lyon's Mercantile up until two years ago was when one of your representatives came into my store after I had moved, I would say in the spring, early spring, possibly March, February of 1954. He wasn't in the store two minutes. He wanted a report out of me and I told him very sweetly that I was sorry, that I had no information for him, that all credit information was available from Mr. Hill's organization, that's credit, too.

Q. But you had no discussion of your business——

A. No.

Q. ——or of any kind with any Lyon party——

A. No.

Q. ——or employee, of any nature, prior to then?

A. No, not until later.

Q. Now, did the Lyon Agency as an entity have ill will against you?

A. I didn't think so at the time. I think so, now.

Mr. W. E. Catlin: I am not asking you what you think, ma'am. I want to know, did they have any?

Mr. Licht: Your Honor, I think the question itself calls for what she thinks.

(Testimony of Irene M. Carrier.)

The Court: Yes.

Mr. W. E. Catlin: Perhaps it does call for a conclusion.

The Court: Counsel is going to withdraw the question. [54]

Q. (By Mr. W. E. Catlin): Did any member with whom you have ever had contact, any person associated with the Lyon Agency that you have had personal contact with, have they ever expressed or have they had ill will against you?

A. Do you mean do they come out and tell me personally?

Q. No. I am asking you if they had ill will against you.

A. I assume that you have a great deal of ill will, from these reports.

Q. Not what you assume. Do you know?

A. It is obvious.

Q. Do you know?

A. Yes, I know. You couldn't print those reports without ill will.

Q. Then, can you tell me who as an individual or which individuals have this ill will against you?

A. That I don't know.

Q. Now, I believe you stated just a moment ago, Mrs. Carrier, that last Memorial Day, you said—

A. Decoration Day.

Q. —Decoration Day, that you met for the first time Mr. John J. Sigerson?

A. That is right.

Q. When, if ever, have you had any other con-

(Testimony of Irene M. Carrier.)

tact, personal contact with a member of the Lyon Agency? [55]

A. We will go back. In April, in April of 1955 I had a business trip over here to the coast. I had written your organization previously. I had asked for an interview in the City of Phoenix. I sent a financial statement. The letter is there.

Q. Do you know that date that you asked for the interview?

A. Yes, sir. There are copies of letters there. It was in March, and we sent a financial statement and it was ignored. I had to come over here on a business trip at the end of April, so I thought if they won't come to me I will go to them. And I called Mr. Abernathy before I left Phoenix, because I wanted to talk with Mr. Abernathy. Mr. Hill had talked with Mr. Abernathy.

Q. Who is Mr. Abernathy, Mrs. Carrier?

A. I don't now what his position is over here. I think he is in charge of collections.

Q. He is an employee of Lyon Agency?

A. Yes, unless you have fired him.

Q. At least, let us say it was this way, at the time you are speaking of, Mr. Abernathy was employed by the Lyon Agency?

A. That is right, and I believe he was in charge of collections.

Q. And did you have an appointment with Mr. Abernathy? [56]

A. Yes. I phoned before I left Phoenix.

(Testimony of Irene M. Carrier.)

Q. And this interview or appointment was on what date?

A. Approximately—I can't give you the exact date—probably the 28th, somewhere in there, of April of 1955.

Q. 1955, approximately April 28th. Have you ever had a further interview with any member of the Lyon Agency, other than the meeting with Mr. Sigerson—

A. No.

Q. —that we just spoke of?

A. No.

Q. Was anybody other than Mr. Abernathy present at the meeting you had with him?

A. Yes, for part of the time, but I don't recall his name. He was brought into the room and he was introduced as a Phoenix representative, but I don't know his name. He didn't stay during the whole conversation.

Q. You assume that he was a member of the Lyon Company?

A. He was introduced to me as being the Phoenix representative for Lyon Mercantile.

Q. All right. Beyond these three people, one that you can't identify, one identified as Mr. Abernathy, and one identified as Mr. Sigerson, you have never had any contact with any other member of the Lyon Company?

A. No, sir, I have not.

Q. Now Mrs. Carrier, would you tell me which of these [57] three, if any, have ill will against you?

A. I don't think personally, if you want to break them down individually, that they have ill will towards me. I think as an organization you

(Testimony of Irene M. Carrier.)

are doing the wrong thing and printing the wrong thing. I have to judge you by what you do, not by what you say.

Q. Now Mrs. Carrier, are you not a registered nurse?

A. Yes, I am a registered nurse.

Q. When did you become owner of the Carrier Furniture Company?

A. When the divorce decree was final in September of 1953.

Q. Now, at this time you took over complete control and ownership of the company?

A. Right.

Q. But I believe you stated you actually assumed direction of the company on——

A. April 10th.

Q. ——April 10th. And as I recall your direct testimony, you stated that you had spent at least a part of your time being active in the business since 1947.

A. No. I said either '48 or '49.

Q. '48 or '49?

A. Right. I went in, in May.

Q. Now, have you ever been active in your profession [58] as a registered nurse?

A. Not for over 20 years. I love furniture and I am in it.

Q. Not for over 20 years.

A. I am registered, however, in the State of California.

Q. Now Mrs. Carrier, at the time that you started to contribute to the business as set forth in

(Testimony of Irene M. Carrier.)

your direct examination, did you have any children? A. Two.

Q. And assuming that it was 1948 or 1949, what would their ages have been at that time?

A. My boy was around seven years old and my girl around 13—I guess eight on the boy.

Q. Eight?

A. Somewhere in there, hitting eight, close enough.

Q. Now Mrs. Carrier, if I am correct, in your direct examination you said that much of the time you spent as much as twelve hours at the store during that period. A. I certainly did.

Q. Did you have any help in raising your children?

A. The first year in that store I didn't even have help at the house in order to do the work. I would get up and put a big washing out and be in that store by 9:30 in the morning and many a night I didn't get out of there until [59] 11:00 o'clock. When we started making some money, then I had some part time colored help. Well, I think it was in '49 I went down there and he net \$19,000 and we got busy there in the fall and we had part time help in the house.

Q. And you left at 9:00 o'clock in the morning and put in twelve hours and went home?

A. Not every day. Every other night. I had to take by turns working, and we didn't get out until 11:00 o'clock at night many, many times.

(Testimony of Irene M. Carrier.)

Q. Who took care of your children during that time?

A. At that time we started working together, my husband and I as a shift. we alternated shifts with two other people, and my girl was old enough, don't forget, to stay with the younger boy. And then after a while I said to him, "I don't think this is right, both of us being away from the children." I said, "Let us break this up. You be home one night and I will be home the other night." In other words we broke the team up.

Q. Mrs. Carrier, I have here a copy of the examination that we engaged in, in Mr. Licht's office, and if you recall, at that time you answered that you had no one to care for them.

A. I didn't have at first. Now you are referring to what happened when I was deserted.

Here I had a 13 year old son and a 19 year old girl. [60] That was the time—that was the age of those children.

Mr. W. E. Catlin: I see.

The Witness: And there was no one to take care of them. There was no support.

Q. (By Mr. W. E. Catlin): This was during the period—I just wanted to straighten this out in my own mind—this was during the period of May-April, 1953 on, then?

A. You were referring back earlier and I was giving earlier facts. You wanted to know how old my children were when I went down to Carrier's Furniture.

(Testimony of Irene M. Carrier.)

Q. Yes.

A. I told you. Now, you are in 1953.

Q. And your girl was 19 years old and you no longer had anyone.

A. I had nothing. I worked in that store ten or twelve hours a day and I went home and washed and cleaned and tried to keep that home together for those children.

Q. Now, Mrs. Carrier, you stated that you became owner of the business by virtue of the divorce decree, is that correct?

A. That is right.

Q. Prior to this time did you have any interest in the business, ownership of it?

A. No. That business was in my husband's name.

Q. Did you receive a salary? [61]

A. No. I was promised one, but I never got it.

The Court: We might recess at this time. I have a civics class here to give a little lecture or something. You may step down. We will recess until 2:00 o'clock.

(Whereupon at 11:55 a.m. a recess was taken until 2:00 o'clock p.m. of the same day, Tuesday, May 14, 1957.) [62]

Tuesday, May 14, 1957, 2:00 P.M.

The Court: All right, the witness may resume the stand.

Mr. Licht: With the court's permission, may I call someone out of turn?

The Court: Yes, sir.

Mr. Licht: Mr. Hill, please.

FRANCIS J. HILL

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: And what is your full name, for the record.

The Witness: My name is Francis J. Hill.

Direct Examination

Q. (By Mr. Licht): Where do you live, Mr. Hill? A. Phoenix, Arizona.

Q. What is your job there?

A. I am manager of the Wholesalers Credit Association of Arizona, which is an Arizona affiliate of the National Association of Credit Men. I am also manager of the Credit Bureau, in the third operation of the Phoenix Lenders Exchange.

Q. How long have you held that job?

A. About nine years.

Q. And how many years' experience have you had in the [63] field of credits and collections?

A. I started in 1929. I have been in and out of it since then. The larger part of the time has been in that work since that time.

Q. Will you tell the court when you first met or became acquainted with Irene Carrier?

A. In June of 1953.

Q. Will you tell the court the circumstances of that first meeting?

A. May I inject there a word of explanation. In the Wholesalers Credit Association we have three departments, what we call a credit interchange department, which is a credit reporting de-

(Testimony of Francis J. Hill.)

partment; we have a collection department and we have an adjustment department.

In the adjustment department, we for the benefit of debtors and creditors alike handle amortizations, compositions, certain types of escrows and similar matters.

I was asked to have my office available for a creditors' meeting of the Carrier Furniture Company, and three creditors' meetings were held in the month of June.

Q. 1953?

A. 1953. Would you like the dates? I can give you the exact dates if you would care to have them.

Q. That is all right. These meetings were held and at that time did you actively participate at all?

A. I did. I sat in at all three.

Q. And were you retained in your official capacity in connection with the Carrier Furniture?

A. The Wholesalers Credit Association was asked to handle this as an amortization matter.

Q. What exactly do you mean by an amortization matter?

A. Well, to contact all the creditors and ask them if they would authorize the Association to represent them and at the same time to accept their pro rata share of any funds which we might receive from the debtor for distribution to all the creditors.

Q. And in that connection what is the first thing that you did?

A. Two meetings were held, on June 3rd, 10th and the 17th, and after the meeting on June 17th

(Testimony of Francis J. Hill.)

we sent out an explanatory bulletin to all of the known creditors. Those creditors were—the list was based on a list I received from the bookkeeper at the Carrier Furniture Company.

Q. Do you remember approximately how many creditors were on that list?

A. I believe there were 60.

Q. And is this document here the first letter that you sent?

A. That is the first bulletin we sent out to the creditors, and as I say, with that we enclose an authorization [65] form for them to sign and return to us.

Q. And that is the letter, the bulletin dated June 26, 1953? A. Correct.

Q. Now, following that, when did you send subsequent bulletins to the creditors? What was the next thing you did?

A. On August 18th, and in order to keep the creditors informed, I sent a second bulletin out as an explanatory bulletin telling them what had transpired since the previous one on June 26th.

Q. And is this a copy of that bulletin (indicating document)?

A. That is a copy of that bulletin.

Q. Then, did you follow that with another bulletin?

A. Then, on September 18th we sent another bulletin, and with that we enclosed checks for 43 per cent of the amount due the various creditors, as the first distribution.

(Testimony of Francis J. Hill.)

Mr. Licht: Your Honor, I would like to offer these three letters of June, August and September as plaintiff's exhibit next in order, I think in one exhibit will be all right.

The Court: All right. They will be received.

The Clerk: Plaintiff's Exhibit No. 4 in evidence.

(Said documents were received in evidence and marked as Plaintiff's Exhibit No. 4.) [66]

Q. (By Mr. Licht): Following this payment of 43 per cent which you said you sent out, what did you next do in connection with it?

A. We sent out—on November 27th we made an additional distribution of eight per cent and with that we enclosed this letter (indicating document).

Q. Then what happened next?

A. We continued to make periodic distributions, one on December 15th of six per cent, one on February 18th of six per cent, one on June 30th of three per cent, one on October 28th of three per cent. That made a total of 69 per cent.

Q. And these last ones you are talking about were in 1954, were they not?

A. That is correct.

Q. And now, this is in November 1953, in this letter, this statement that you made?

A. Yes, that is right.

Q. And the payments that you made were in 1954, is that correct?

A. That is right. I haven't got copies of all those payments, but I have most of them here if you would like to have them.

(Testimony of Francis J. Hill.)

Mr. Licht: I think it is not necessary to include them all in the record, unless you would like to have them [67] included. Do you want me to include all these, counsel?

Mr. W. E. Catlin: I beg your pardon?

Mr. Licht: Do you want me to include all these? I think it would just burden the record. Do you want me to include all these letters showing percentage of distribution?

The Court: I don't think you need to put them in, but you have them there and you will have them available.

Mr. Licht: I have them and they will be available, yes.

Q. Now, during this period, that is from the summer of '53 when you first had something to do with the Carrier Furniture Company until the last payment that you mentioned, were you in constant contact with the business?

A. I was in frequent contact with it.

Q. And did you have occasion to visit the premises?

A. Yes. I made a practice to go down periodically or whenever Mrs. Carrier requested me, to her place of business.

Q. Now, going back, if I may for a minute, to the period between June of 1953 and the time that you made the first 43 per cent distribution of which you spoke, did you have any active part in the control of the funds of that firm at that time?

A. Mrs. Carrier of her own accord asked me to

(Testimony of Francis J. Hill.)

co-sign checks there for a period of time. I can't tell you the exact date that that started, but she wanted to have some [68] control over the distribution of funds, even for the current expenses. One reason for that was—may I give you an explanation?

Mr. Licht: Yes.

Mr. Lindenbaum: Might I object, if the Court please, to him giving reasons.

The Witness: All right.

The Court: All right. I will sustain the objection.

Q. (By Mr. Licht): You did co-sign checks anyway, is that right?

A. I did for a period of time.

Q. Did you send out letters to the various creditors in the beginning, asking them to go along with this plan you had for payment?

A. I did. That was the first bulletin of June 26th I referred to before.

Q. And what sort of responses did you get?

A. We received a very satisfactory response. We received authorizations over a period of time from all but eight or nine of the 60 creditors?

Q. Do you have any way of identifying those eight or nine that you didn't receive responses from?

A. I believe I have a list of them. I have here a list of the creditors.

Q. That didn't go along with the plan? [69]

A. That did not return the signed authorization.

(Testimony of Francis J. Hill.)

Q. Would you read that list, please?

A. Craft Furniture Company, Blowing Rock Furniture, Colonial Craft, Dixie Furniture Company, the Englander Company, Lights of Hollywood, Sandhill Furniture Corporation, Virtue Brothers and Viking Artline Corporation.

Q. Except those people, did all the other known creditors go along with your plan?

A. They did.

Q. Now, I believe there was a contract of plan, was there not, which you had all the various creditors sign?

A. Yes.

Q. Do you have a copy of that?

A. I think this is it here. This is the agreement which they signed. That is one of the signed agreements, by the way.

Q. Now, I believe this agreement calls for, among other things, the payment of a thousand dollars a month after the initial payment, is that correct?

A. That is correct.

Mr. Licht: May I introduce this, your Honor, as plaintiff's exhibit next in order?

The Court: Yes, as the next in order.

Mr. Lindenbaum: That is the extension agreement?

Mr. Licht: This is the agreement with all the creditors for payments. [70]

The Clerk: Plaintiff's Exhibit No. 5.

The Court: No. 5.

(Said document was received in evidence and was marked as Plaintiff's Exhibit No. 5.)

(Testimony of Francis J. Hill.)

Q. (By Mr. Licht): Do you recall—did she make the payments under this agreement?

A. She made—first I refer to the 43 per cent payment. Then on November 27th an eight per cent payment. Then we made a payment of six per cent on December 15th. The reason for that was that a thousand dollars would have represented approximately three per cent a month and the work involved was so voluminous that we made it a practice to make payments every 60 days, rather than every 30, because our fee was eight per cent, that is the gross fee was eight per cent which included legal services, and we simply couldn't afford to make payments to 60 creditors every 30 days out of a thousand dollars.

Mr. Lindenbaum: Your Honor, the witness refers to December. Will you please state what year, in December?

The Witness: I refer to three per cent of the original indebtedness.

Q. (By Mr. Licht): December of what year?

Mr. Lindenbaum: December of what year?

The Witness: I was making the—— [71]

Q. (By Mr. Licht): Well, just what year were you referring to when you were referring to December?

A. I was referring to December of 1953.

Q. Thank you. Now, was there a period following that when Mrs. Carrier didn't make the payments required? A. Yes.

(Testimony of Francis J. Hill.)

Q. Do you recall the circumstances with respect to that?

A. We made a payment of six per cent on February 18th, which covered the payments due January 15th and February 15th, and then on March 15th, I sent out an explanatory letter to the creditors, a copy of which I have here, and to that letter was attached a letter which I had received from the firm of Bumsted & Linsenmeyer, the attorneys for Carrier Furniture Company, and with it as well I enclosed an agreement which if the creditors signed it would authorize a moratorium on the payments of a thousands dollars for the months, March 15th, April 15th and May 15th.

Q. This was 1954, is that right?

A. This was as of 1954.

Q. And did the creditors substantially agree to that moratorium period? A. They did.

Q. And what happened after that moratorium period?

A. Then, on June 30th of 1954, I made one payment of [72] three per cent of the original indebtedness.

Q. How much was that?

A. It was a thousand dollars.

Q. It was how much? A. \$1,000.

Q. What then next followed?

A. Then there was no further payment—I did not receive any until October, '54. That was another thousand dollars and we made the distribution on October 28th.

(Testimony of Francis J. Hill.)

Q. When was your next payment that you received?

A. That payment of October 28th represented a payment of 69 per cent.

Q. Of the original indebtedness?

A. Of the original indebtedness.

Then, on January 7th——

Q. Of which year, now, January 7th?

A. Of 1955, at the request of Mrs. Carrier I sent a letter out. May I read it or not?

Q. No.

A. All right. This was a letter stating that on October 28th I had made a distribution of three per cent and mentioning the fact that that three per cent represented a total payment of 69 per cent of the original balance to the creditors.

Then, Mrs. Carrier asked me to invite the creditors to [73] accept one single payment of an additional ten per cent of the original balance in full settlement of the account. In order to make that additional ten per cent payment, she said that she had arranged to borrow \$6,000 from her friends, \$3,000 of the \$6,000 to be turned over to our Association for distribution, and the other \$3,000 was to be used to purchase for cash additional furniture for the normal operation of the business.

Q. And you dispatched this, then, to all the then known creditors?

A. I did. Pardon me. I dispatched that to all the known creditors with the exception of the credi-

(Testimony of Francis J. Hill.)

tors who were represented by the eight or nine firms mentioned.

Q. Who represented them, if you know?

A. Locally, David E. Wilson, attorney.

Q. And did the creditors you sent that list to go along with that arrangement?

A. All with the exception as I recall of I believe three.

Q. Approximately how much was involved in those three?

A. This is only recollection: I believe it was about \$500.

Q. And then did you do anything else in connection with the Carrier account after that?

A. I sent a second letter out January 18th to those [74] creditors who had not already accepted that ten per cent payment and I followed that up with another letter on January 31st.

Mr. Lindenbaum: If your Honor please, I would like the year on these.

The Court: The year?

The Witness: I am sorry. January 18, 1955.

The Court: All right.

The Witness: Pardon me.

Then, on January 31, 1955 I sent another letter, with a balance sheet which had been given to me by Mrs. Carrier, and with it I enclosed a mimeographed copy of a letter of explanation which Mrs. Carrier gave to me.

Mr. Licht: Your Honor, at this time, before I get too lost on this, I would like to offer this letter

(Testimony of Francis J. Hill.)

of March 15, 1954, as plaintiff's exhibit next in order. That is the one I just showed you. I have been holding it.

Mr. Lindenbaum: Oh, you showed it to us?

Mr. Licht: I showed it to you.

The Court: All right.

The Clerk: That is Plaintiff's Exhibit No. 6 in evidence.

The Court: Yes.

(Said document was marked Plaintiff's Exhibit No. 6 and was received in evidence.) [75]

Mr. Licht: Here is a letter which I will show you. This is Plaintiff's Exhibit No. 7, which is the letter of January 7, 1955.

The Clerk: Will it be received?

The Court: It will be received.

The Clerk: Plaintiff's Exhibit No. 7 in evidence.

(Said document was marked Plaintiff's Exhibit No. 7 and was received in evidence.)

Q. (By Mr. Licht): And when that last \$3,000 was disbursed, was that your final connection with this matter?

A. It is not my final connection.

That final distribution of ten per cent was made on March 4th, if you care to have a copy of that letter.

Then, on April 5th, I sent out the final bulletin which I recall having mailed, and I sent that to certain creditors whom Mrs. Carrier asked me to mail it to and said that they would have some in-

(Testimony of Francis J. Hill.)

formation regarding her financial status, at that particular time, that is, April 5, 1955.

Q. Now, on this question of financial status, did you have a financial statement of Carrier Furniture during the period when you were doing this?

A. The first financial statement we had was one dated May of 1953, which was enclosed with the first bulletin I mailed to the creditors on January 26th.

Q. You sent that to all the creditors? [76]

A. That was sent to all the known creditors.

Q. Does that include the list that you read that were represented by Mr. Wilson?

A. Correct.

Q. And during this period from 1953 to 1955, did you ever refuse to give a financial statement to anybody who asked for it in connection with the Carrier Furniture? A. No.

Q. Did anybody from Lyon's firm contact you asking for a financial statement? A. No.

Q. Did anybody from Lyon's contact you at all?

A. I was not contacted, although on one day I met two representatives of Lyon's Furniture, but it was not in connection with any request on their part for a financial statement.

Mr. Lindenbaum: May we have the time, please?

Q. (By Mr. Licht): Yes. When was that?

A. My recollection is that it was Memorial Day, I do not know what year, Mrs. Carrier called me up and stated that two Lyon's Mercantile representatives were going to be in town and she asked

(Testimony of Francis J. Hill.)

me if I would not come to the store, and that is all there was, that was her statement. I went to the store. I made no observation, made no comment. I was simply present. [77]

Q. And did they ask you anything about the matters, do you remember?

A. Not to my knowledge.

Q. Now, since these items covered in the list which you gave, have you received any other matters, from any other of your customers throughout the United States for collection with Carrier Furniture or Wishmaker House? A. No.

Q. And at the time this matter was first turned over to you in 1953, did you have an opinion as to—well, I will strike that. In your dealings with the Carrier Furniture Company and Wishmaker House, were you representing the creditors, is that your job? A. That is correct.

Q. You were not representing Mrs. Carrier at any time, were you? A. No.

Q. Your job, then, was to represent the creditors in the collection of these accounts, is that correct? A. That is right.

Q. In your opinion, and from your experience in the business which you have heretofore stated, would it be your opinion that the creditors received more or less of a distribution from this matter than they might have received had the matter been turned over into bankruptcy? [78]

A. That is my opinion, based on the fact that

(Testimony of Francis J. Hill.)

I have acted as a receiver and a trustee in bankruptcy.

Q. What is your opinion?

A. My opinion is that they would probably receive two to three times as much through an amortization as they would if bankruptcy proceedings had been consummated.

Q. In your opinion, during the period of time in which you were active in this matter, that is, between 1953 and 1955, did you have an opinion as to the management of Wishmaker House?

Mr. Lindenbaum: Your Honor, I object to that question as being immaterial and incompetent.

The Court: I will overrule the objection. He may answer.

Mr. Lindenbaum: I respectfully except.

The Court: He may answer. I will overrule the objection.

The Witness: State that question again.

The Court: All right.

Q. (By Mr. Licht): Did you have an opinion as to the management of the business during these years?

A. I thought she was doing a very satisfactory job.

Q. Would that opinion be the same from the standpoint of being a credit and collection man as from——

Mr. Lindenbaum: I object to that, if the Court please, as incompetent. [79]

(Testimony of Francis J. Hill.)

Mr. Licht: He has testified that this is his business.

The Court: I will overrule the objection. He may answer.

The Witness: Will you please state the question again?

Q. (By Mr. Licht): Well, as a man with experience in the field of credits and collections, would you consider that the management of this firm during 1953 to 1955 was good or bad, or what?

A. Why, I think it was very good and I was aware of the difficulties she was experiencing in the operation of the business.

Q. What difficulties were you personally aware of?

A. She was unable to get certain lines of furniture which she had handled in the past, and of course that prevented her from making deliveries to certain customers who wanted brand merchandise, particular types which she wasn't in position to deliver.

Q. Mr. Hill, I am going to show you a letter dated October 14, 1954, which appears to be signed by you and ask you to read that letter, please.

A. "Dear Mrs. Carrier"—

Q. No. Just read it to yourself.

A. All right.

(A short intermission.)

Q. Now, have you read it? [80] A. Yes.

Q. Does that refresh your recollection at all as

(Testimony of Francis J. Hill.)

to some payments that you had sent to some creditors which had been refunded or returned?

A. May I refer to something here?

Q. Yes.

(A short intermission.)

The Witness: I believe that that letter refers to a check which I had sent to Attorney Wilson in payment, in partial payment of the amount due the creditors which he represented.

Q. (By Mr. Licht): And what happened with respect to that? What did he do or what happened?

A. Well, it was customary, as I said previously, to deduct eight per cent from each remittance to the creditors to cover our fee and to cover the legal costs involved, and Attorney Wilson declined to accept payment on that basis, he declined to permit us to make any deductions for our services.

Q. Did he send any money back for any other reason that you recall?

A. I don't recall at the moment. Pardon me. I do recall something else, if I may supplement that. It was not on October 4th. May I refer to my papers here a minute?

Mr. Licht: Yes.

(A short intermission.) [81]

The Witness: I think this 145—

Mr. Licht: Go ahead.

Mr. Lindenbaum: If your Honor please, I would like to object to statements of what Attorney Wilson did, in view of the fact that there has been no foundation laid, prior showing that Attorney Wil-

(Testimony of Francis J. Hill.)

son has anything to do with Lyon, or that we are to be bound by the statement.

Mr. Licht: I intend to tie it up with later testimony, your Honor.

The Court: He is called out of order. I will overrule the objection. He may answer.

Mr. Licht: Go on. Your answer?

The Witness: I believe that my statement is correct regarding that 145.54. I haven't given this any thought, now, for almost three years, so it is just my recollection. In August 1954, however, I had made three payments to Attorney Wilson, one for \$17.50 payable to the Englander Company, one for \$42.34 payable to Sandhill, and one for \$36.68 payable to the Dixie Furniture Company, and the reason he returned those checks to me was because he had executions out for the full amounts of the claims and he said he could not accept a partial payment. That was in August of 1954.

Q. (By Mr. Licht): I just want to show you one more document, if I may, sir. This is Plaintiff's Exhibit No. 2 for identification, and I ask you if that document is familiar to you? [82]

A. Yes, it is.

Q. And did your office prepare that?

A. We did.

Q. What is that?

A. That is a complete list. I think that is dated in August, is it not? That is dated August 27, 1953. It is a complete itemized list of the checks that we were planning to forward to the creditors of Car-

(Testimony of Francis J. Hill.)

A. The Wholesaler's Credit Association of Arizona.

Q. The Wholesaler's Credit Association of Arizona, this concern, does it do credit reporting?

A. It does.

Q. And had you ever issued a credit report on Carrier Furniture prior to July of 1953?

A. I assume we did, although I don't know. I have a staff of over a hundred employees. We do a large volume on the overall operation and I am not familiar with detail in one department of the Association's outstate. We turn out in [85] excess of 900 credit reports a day and with that volume it is impossible for me to know unless I make it a point, of what that daily volume consists.

Q. Well, in this particular case, then, Mr. Hill, when we are talking about your relationship with the Carrier Furniture Company which it was called at that time, this would then fall within your adjustment department?

A. That is correct.

Q. Is that correct?

A. That is correct.

Q. And when you have a business that comes to you for assistance within your adjustment department, as a general rule are they healthy businesses?

A. As a rule, they are in a condition where they need cooperation on the part of their creditors.

Q. And when you arrange to assist in the affairs of a business in such a condition, do you take over the entire financial management of the business?

(Testimony of Francis J. Hill.)

A. It depends entirely on the particular case. It varies according to the case at issue.

Q. Now, in the particular case that we are speaking of, of the Carrier Furniture Company, did you take over the financial management of the affairs of the business at that time?

A. We did not. [86]

Q. And what exactly did you endeavor to accomplish for the Carrier Furniture Company?

A. Bear in mind that I was working with the cooperation of the creditors' committee. I looked to them for advice and help whenever it was needed. And I was representing—I felt that the Wholesalers was representing those creditors, and it was our job to have the business operated efficiently. I felt that Mrs. Carrier was doing a good job. The creditors' committee felt as I did and were satisfied that she was cooperating to the fullest extent. We were not concerned at all with—we had no thought that she would not do what she had agreed to do, and that was to cooperate completely.

Q. Well now, you state that they all agreed that Mrs. Carrier was doing a good job. This may be true, but what was this good job she was doing, as far as you were concerned? Wasn't it the paying up of the \$49,000 or roughly \$49,000 in indebtedness which was past due at this time?

A. That is right. That was our major objective.

Q. And during this period that you were aiding and assisting in this, you were aiding and assisting in the past due obligations only, is that correct?

(Testimony of Francis J. Hill.)

ited amount of merchandise, to continue the operation of the business.

Q. This is a custom of the trade?

A. This is customary in many instances.

Q. So then, this is again a matter for the individual manufacturer to determine?

A. It is entirely up to the manufacturer to decide what should be done.

Q. Now, I am looking at a copy of a letter of September 18, 1953, written by you. I beg your pardon. This is not the one I want.

This is a letter written June 26, 1953, and I note that in this paragraph you state that you were retaining cash for C.O.D. purchases, is that correct?

A. Correct.

Q. Then, in June 1953, the Carrier Furniture Company was making purchases on a C.O.D. basis?

A. Correct. Fill-in merchandise.

Q. And this was approximately the time you came into the picture? A. Right.

(A short intermission.) [90]

The Witness: That is customary for any store in that condition to do that.

Q. Now Mr. Hill, you stated that an extension agreement was entered into with a great number of the creditors. Was this on your advice?

A. Why, I don't give advice. I simply pass on the information and let them make their decision. I do not urge people to do it.

Q. Well then, let me put it this way: You say you were governed to a large extent by the desires

(Testimony of Francis J. Hill.)

of the creditors' committee? A. Right.

Q. Which was made up of creditors who all had past due obligations owed by the Carrier Furniture Company? A. That is right, correct.

Q. Did the creditors' committee feel that this was a necessary thing?

A. The creditors' committee felt that if this was not done, it would simply mean that the business would have to be discontinued and that would result in bankruptcy; and a going business is always a more satisfactory way of completing the payment of past due balances, rather than simply closing it up and selling whatever furniture is left at auction and get a very, very small percentage of its retail value.

Q. What steps did you take to physically protect the [91] creditors' interests during this period?

A. Well, bear in mind that the local creditors who were acquainted with the Carrier Furniture operation had confidence in Mrs. Carrier, and it was not felt necessary to employ the equivalent of a custodian out there to watch everything that went on. At that particular time, as I recall it now, we were simply co-signing checks with Mrs. Carrier and felt that was sufficient.

Q. And isn't it true that this is normal procedure?

A. That is normal procedure.

Q. The co-signing of the checks?

A. That is right.

Q. Whether or not Mrs. Carrier had requested

(Testimony of Francis J. Hill.)

it, it was the normal procedure for this type of——

A. It is a normal protection.

Q. At the time you assumed the duty of assisting the Carrier Furniture Company, did your concern have any claim for collection against Carrier Furniture Company from other creditors?

A. No.

Q. Have you at any time had any claims for collection? A. Not to my knowledge.

Understand, again, that we handle a very sizable volume of business. Ours is a departmental operation. With the staff I have, I can't keep a detailed account of what goes on [92] in any one department.

The supervisor of the department or manager is responsible for the operation of the department.

I am not familiar with all the details.

Q. Now, would you state to me the total amount in percentage that was eventually—and by this I mean from the 1953 to the 1956 period—recovered by creditors, the percentage that was recovered by creditors of the original indebtedness.

A. 79 per cent.

Q. 79 per cent. Were there any exceptions to this?

A. As I recall it, there were three representing about \$500.

Q. And on these exceptions, did they receive more or less than 79 per cent?

A. Those folks eventually received the full amount, because they refused to go along.

(Testimony of Francis J. Hill.)

Q. Did they obtain judgments and levy executions?

A. That I couldn't answer. There were certain—I was more or less inactive after—I am not familiar with everything that went on after the date of that ten per cent payment which I think was March of 1955. I believe that is the date.

Q. Let me ask you one more question, please, Mr. Hill. Is your Association in effect a competitor of the Lyon Agency? [93] I mean do you handle the same type of thing they do?

A. It may be that I am not familiar, too familiar, with the operation of Lyon's. I think it is a special—I believe it is a specialized credit service, whereas, we furnish information on all types of debtors.

Q. Supposing that you have a competitor in this business of yours, limiting it strictly to the Arizona business, would you ask this competitor for a credit report on some other business?

A. We don't—we do not make it a practice of doing it, but to be specific, if, for instance, Dun & Bradstreet wants information which we have, we are glad to give it to them.

Q. Yes, but that wasn't my question. My question is specifically as a general custom of the trade, competing organizations, do they or do they not ask their competition for credit reports?

A. Not in wholesale credit, as a regular practice.

(Testimony of Francis J. Hill.)

Mr. W. E. Catlin: Thank you. One moment. Your Honor, I have a few more questions.

The Court: Certainly.

Q. (By Mr. W. E. Catlin): To the best of your knowledge, Mr. Hill, have you ever been called on by the Lyon Agency for a credit report on any creditor—I don't mean creditor, Mr. Hill, I mean any business organization? [94]

A. Not to my knowledge, in the Wholesalers. I received a letter, not too long ago, as manager of the credit bureau asking if we are in a position to furnish them with credit information, but that was in my capacity as manager of the credit bureau and not the Wholesalers.

Q. I am limiting this to you——

A. Yes, I just wanted to have you understand that.

Q. Now, one more thing. You stated that you met one member of the Lyon Agency. I think this was on Decoration Day?

A. That is my recollection.

Q. Could you be a little more definite in pointing out what year it was?

A. I don't remember. I simply remember that—I don't know whether it was '54 or '55, when it was, I couldn't answer that question.

Q. Isn't it true that it was just a year ago, 1956?

A. I don't know when it was.

Q. You just don't remember?

A. I am sorry. I wouldn't know the gentleman if I saw him.

Mr. W. E. Catlin: Thank you. That is all.

Mr. Licht: I have nothing further. May the witness be excused?

The Court: Yes, the witness may be excused.

We might stop and take the afternoon recess. We have accommodated the witness. We will take the afternoon recess.

(Recess.)

The Court: We will just come to order. Call the plaintiff back on the stand.

IRENE M. CARRIER

the plaintiff herein, resumed the witness stand on her own behalf and testified further as follows:

Cross Examination—(Continued)

Q. (By Mr. W. E. Catlin): Mrs. Carrier, let us go back to 1953, where we left off. Now, sometime in the summer of 1953, after you took over the business in its entirety, you entered into an extension agreement with your creditors, is that correct?

A. That is true.

Q. Do you recall when this occurred?

A. Well, actually, verbally it occurred in the early part of June. In writing it occurred, went out in writing in the credit agreement at the end of my divorce, which was around the end of September.

Q. And do you recall the terms of this agreement specifically, when it was to take effect, when you were to make the first payment under it?

A. Yes, I do.

(Testimony of Irene M. Carrier.)

Q. On what date was that? [96]

A. The original meeting, and Mr. Hill has his papers here, there were three meetings I believe that were called and I believe if you will read those letters you will see that there is a promise of payment to creditors around early in July.

Q. Excuse me, Mrs. Carrier. I am speaking of the formal agreement that you cited, the written one.

A. The written agreement was around the end of September, as I recall.

Q. When were you to make the first payment after the date of the agreement?

A. Well, I was to make a payment each month.

Q. Was this October, starting in October, November?

A. We made the big disbursement there I believe the end of September, October——

Q. And according to the terms in the agreement, then, you were to make a payment monthly, is that correct? A. That is right.

Q. And did you make the payments as called for under this agreement?

A. As long as I could, I did.

Q. As long as you could. I assume from this that you were not able to continue to make the payments.

A. That is when we asked for the moratorium.

Q. When did you ask for that moratorium? [97]

A. That was asked for I think in March of 1954.

(Testimony of Irene M. Carrier.)

Q. Did you make the payment for March of 1954?

A. I don't believe we did. I think we made January—December, January and February, if I recall.

Q. What was the dollar value of each payment, how much was the payment to be?

A. I don't understand.

Q. How much were you to make, what size payment each month?

A. A thousand dollars each month.

Q. You made these payments, then, until March, but not including March, 1954?

A. That is correct.

Q. When were these payments supposed to have been made, at what time of the month, was there a specified date?

A. I am not sure. I think they were to be in sometime between the 10th and the 14th of the month, but I am not sure.

Q. I see. And sometime between the 1st of March and roughly the 14th, you realized that you could not make the payment for March?

A. That is right.

Q. And you then asked for the moratorium?

A. That is correct.

Q. And for how long did you propose a moratorium? [98]

A. For three months.

Q. For three months. This would be for March, April and May?

A. That is right.

Q. Resuming then, in June, is that correct?

(Testimony of Irene M. Carrier.)

A. We made a payment in June, I believe.

Q. Did you resume in June?

A. I am fairly certain we made a thousand dollar payment in June. We could not make it in July. We made \$500.

Q. In July you were unable to meet the terms of the agreement? A. We made \$500.

Q. Did you make any \$500 payments or \$1,000 payments under the express terms of this agreement thereafter, June of 1954?

A. Would you say that again?

Q. Did you make any further specific payments under the terms of the agreement, after June of 1954?

A. Yes, but I don't remember just how much. We have voucher checks there showing payments into the fall. Just how much I don't recall.

Q. You made payments into the fall of 1954. Do you recall whether there were all \$500 payments?

A. Mr. Catlin, we made payments up to the time of settlement. As to whether they were—I think sometimes [99] they were a thousand and I think sometimes they were \$500—the best I could do.

Q. This I realize, Mrs. Carrier. What I want you to express to me is did you continue to live up to the terms of the agreement after the moratorium, until you paid the debts off in their entirety?

A. May I put it this way: To the best of my ability, I always tried to live up to that agreement.

(Testimony of Irene M. Carrier.)

Q. Then, may I ask you this question: Did you have the ability to pay all your debts off under the terms of the extension agreement?

A. Did I have the ability?

Q. Yes.

A. Apparently I thought so or I wouldn't have assumed it.

Q. But did you have the ability?

A. I think I did. I think I did beautifully well.

Q. Did you pay the indebtedness off in accordance with the terms called off by the extension agreement?

A. To the very best of my ability.

Q. I am sorry, but this doesn't answer my question. I need either a yes or a no.

A. A thousand dollars was paid each month when I could do it. There were times I think when we dropped down to 500. [100]

Q. Were there months when you paid nothing?

A. I don't believe so, after the moratorium, but I can't say for sure.

Q. You can't say for sure. However, you are certain that you were not able to pay \$1,000 each and every month as the agreement called for?

A. That is right.

Q. Did you ever pay the creditors to this agreement 100 cents on the dollar?

A. Now, would you say that again, please?

Q. Did you ever pay the creditors who were parties to this agreement, the extension agreement

(Testimony of Irene M. Carrier.)

that we are just speaking of, their obligations 100 cents on the dollar?

A. We paid three people who Mr. Hill told you about. I don't remember their names.

Q. How much did you pay the remaining people? A. 79 cents on their dollar.

Q. 79 cents?

A. Two of your accounts had a hundred cents.

Q. Do you recall when this payment was completed, the 79 cents on the dollar?

A. I think either February or March of 1955. That would be less than two years after I took over.

Q. Mrs. Carrier, I have here a letter, a mimeographed letter dated January 29, 1955. This is addressed to the [101] creditors of Carrier's Furniture. May I ask you whether or not you wrote that letter? A. I wrote this letter.

Q. Did you send it to all of your creditors?

A. I gave it to Mr. Hill's organization and he sent it, I believe.

Q. I see. Now in this letter, Mrs. Carrier—excuse me, your Honor—

(A short interruption.)

Isn't it true, Mrs. Carrier, that in January of 1955, you advised your creditors that you were operating your business on a shoestring?

A. That is right. They knew that all along.

Q. And at this same time didn't you advise them that you were on a C.O.D. basis?

A. I think the letter says C.O.D. and C.B.D.

Mr. Catlin, from the time that I moved that

(Testimony of Irene M. Carrier.)

store and started restocking and getting new merchandise, with the exception of a couple of "sharp boys," who dared to ship me a C.O.D. on fabrics, and there is one firm over here in Los Angeles that I occasionally have to buy that way from because they have some fabrics tied up that I can't get anywhere else, my store was never on a C.O.D. basis and it was not for this reason, because I felt that I couldn't possibly go out on that market and buy on C.O.D. and protect [102] my manufacturer. How would I know that I would have five or six hundred dollars in the bank when that merchandise came in? And I never placed a purchase order and I never confirmed an order without letting them know in advance. And I would say to them, "I have \$500" or "I have \$600. You may ship, and will you please confirm as to when you are shipping."

My money went on in advance, and my money was held, incidentally.

Q. Isn't it a fact that you did tell your creditors you were on a C.O.D. basis?

A. There is very little—I think you will read in that letter it is C.O.D. and C.B.D.

Q. I hand this to you and here is the paragraph (indicating), so that you may refresh your memory, Mrs. Carrier.

A. Well, it says C.O.D., but that was actually the way it was worked and if you will check with the manufacturers, you will find that it is true.

Q. Then, it is true that you did tell your credi-

(Testimony of Irene M. Carrier.)

tors generally, and all of them, that you were on a C.O.D. basis?

A. Well, you might look at it this way, too: Whenever you are in a mess like this and you try to open an account, they immediately say C.O.D. to you and I right along refused C.O.D., and I told you why I refused a C.O.D. They are still doing it to me. However, I think if you will check with the manufacturers you will find that what I am saying is true; [103] there was very little C.O.D.

Q. Now, at this time, approximately in January, 1949, you had somewhere in the neighborhood of \$9,700 remaining that had not been paid of these original past due accounts that you assumed, is that correct?

A. You just said 1949. Would you please state it.

Q. No. 1955, January, 1955, January 29, 1955, is that correct?

A. When that letter went out, we had paid that indebtedness down to \$9,700.

Q. And at this time, didn't you tell your creditors that unless they accepted your settlement offer of \$3,000 on the \$9,700, you were simply going to walk out and leave them holding the bag?

A. That is right. That is the only choice I had. Mr. Catlin, when that letter went out, I had out on my little store almost \$4,000 of my working capital, some of which had been out for over 60 days, and I had almost two years of that and I kept

(Testimony of Irene M. Carrier.)

my doors open. That is why the letter went out, because I had all I could take and I knew they were breaking me.

Q. Was this letter sent with the approval and with the counsel of Mr. Hill?

A. The letter was I believe sent out from his organization. [104]

Q. Mrs. Carrier, when your husband ran the business, did he employ a manager?

A. He hired a manager.

Q. Could you tell me when this was?

A. About the fall of '49 until, oh, we had him two years. I wouldn't call him manager, however. He really didn't manage.

Q. Well now, after you assumed responsibility for the entire management of the Carrier Company, you state that you moved the store. This is correct, you moved to a new address, right.

A. My lease was expiring on East Van Buren, so I moved in January of 1954.

Q. And you obtained new premises and moved?

A. My lease was expiring.

Q. And at this time you changed the trade style of the business to Wishmaker?

A. To Wishmaker House, that is right.

Q. And you operated and managed the Wishmaker House completely yourself?

A. Yes, sir.

Q. Didn't you also have another store?

A. We had an overflow of inventory from the old store, which at the time we moved was, oh, a

(Testimony of Irene M. Carrier.)

good probably thirteen or fourteen thousand dollars, that couldn't go into this [105] little store. It wasn't the right type of merchandise. We wouldn't have had room for it anyway. So we rented a very cheap location at a hundred a month and tried liquidating it down there and putting our trade-ins and stuff like that down there.

Q. And in effect you opened another store?

A. It was really a warehouse sort of thing and liquidation of this old inventory from Carrier's Furniture.

Q. Did you call it Budget House?

A. We just called it Carrier's Furniture. Carrier Furniture is well known, so why kill a name?

Q. You spent your time operating Wishmaker's, because it was the prime line, correct?

A. I spent most of my time there, but I couldn't get decent management down at the other place or a decent sales person, and I never could be down there to sell, but I had to be back and forth, to see what was going on, taking inventory and that type of thing.

Q. You had somebody running the Budget outlet for you? Did you get that, Mr. Reporter? She nodded. I assume that means yes, Mrs. Carrier.

A. Oh, I am sorry. What did you say before that?

Q. You had somebody running the Budget store for you?

A. We tried it for a while. It didn't work,

(Testimony of Irene M. Carrier.)

couldn't hire anybody decent, so I just closed it up, waited for the [106] summer months to be over with, and simply liquidated and took as much for my dollar as I could.

Q. Prior to your liquidating it, you did have somebody running it for you?

A. For a few months.

Q. Now Mrs. Carrier, going back to 1953, shortly after you took over the business, didn't you have trouble at that time in obtaining merchandise from a great many of the wholesalers?

A. Mr. Catlin, the minute I took over April 10th of 1953, within a week the word was out over here, all over Phoenix, they were squeezing me in like nobody's business. I had to fight to keep those doors open.

Q. You had a lot of creditors that were on you, didn't you?

A. The big squeeze came out of Los Angeles, right here is where it came from. My Phoenix credit people—there was a lot of money owed in Phoenix—when they saw what I was trying to do, they knew me, they didn't squeeze.

Q. Didn't you have a great many people that you dealt with other than in the Los Angeles and Phoenix areas?

A. Oh, yes. We bought in the east.

Q. In Chicago?

A. We bought in the east. We bought in the east, but very few of those people ever squeezed.

(Testimony of Irene M. Carrier.)

The only ones that [107] did any squeezing are the ones that you people have.

Q. Didn't some of your eastern people—by using the word eastern I am using the western interpretation—east of the Mississippi River, file suit and obtain judgment against you?

A. Out of the 60 or 61 accounts that Mr. Hill had, you have the number there that through you people filed judgment suit against me, out of which there are 1, 2, 3, 4, 5, 6, 7, 8, 9.

Q. No. I am talking, Mrs. Carrier, of before you obtained Mr. Hill's assistance in this matter?

A. Oh, no. Most of those suits, these eastern suits, like Dixie and Sandhill, if I recall, were filed somewhere in July or August. Mr. Hill's credit meeting had been held.

Q. Yes, that is my point, before there was an extension of any kind?

A. Well, Mr. Hill actually had taken over from the early part of June and you have letters here that he sent out to the trade. The credit agreement didn't go out to the trade until later, because we couldn't send it out.

Q. But the credit agreement was entered into sometime in September, the extension?

A. That is right, but letters to all these accounts went out from Mr. Hill's organization.

Q. And isn't it true that you were sued and judgment [108] taken prior to this time?

A. That is true, but Mr. Hill was still taking over.

(Testimony of Irene M. Carrier.)

Q. And it is correct, Mrs. Carrier, and you correct me if I am in error, that we have definitely established that prior to the first of 1954, you were on either a C.O.D. or a C.B.D. basis?

A. Say that again, please, Mr. Catlin.

Q. Prior to January 1, 1954.

A. From 1953, April, 1953.

Q. Through this period?

A. Through that period, yes. I automatically put myself on a C.O.D. basis in Phoenix.

Q. But you were on either a C.O.D. or a C.B.D. basis?

A. That is right. You may continue that for a long time.

Q. Mrs. Carrier, in your complaint, you allege that you had a good credit rating. Will you please tell me who gave you a good credit rating in 1953?

A. What do you mean in my complaint? I don't understand you.

Q. In the plaintiff's complaint which you filed to initiate the action we are trying today.

A. In 1953, before the thing was in a mess, is that what you are referring to?

Q. You stated that prior to publication of Lyon's [109] report of March, 1954 you had a good credit rating.

A. We did have an excellent credit rating.

Q. All I want to know is who in 1953, after you took control of the business, gave you a good credit rating?

(Testimony of Irene M. Carrier.)

A. I don't believe that was ever said or ever implied.

Q. Did you have a good credit rating at that time?

A. Before April 10, 1953, I could go into the Chicago market.

Q. No. I am speaking of the time when you took over the business until the issuance of the first Lyon report, in March of 1953.

A. Who says? I didn't say that, and I think that if my attorney put that they are implying wrong.

Q. Then, in 1953, during this period, you did not have a good credit rating?

A. How could I have a good credit rating when I am in a mess, owing \$49,000? And I think my attorney meant that Carrier's Furniture, prior to this mess, had a good credit rating, which it did have.

Q. You mean the Carrier Furniture Company in 1946 and 1947?

A. 1946, 1947, until I went down there, Carrier's Furniture was a dead duck. When it started making money, we discounted most of our bills.

Q. At this time the business belonged to your husband? [110]

A. It always belonged to my husband, Mr. Catlin.

(A short intermission.)

The Court: Go right ahead.

Q. (By Mr. W. E. Catlin): Then, Mrs. Car-

(Testimony of Irene M. Carrier.)

rier, isn't it true that you have never had a rating of good payment in a credit report since you took over the Carrier Furniture Company?

A. I wouldn't say that is true. Dun & Bradstreet called me up. I have done always the best I could. Dun & Bradstreet have been very cooperative and they called me up, I would say a year and a half ago, and said, "Irene, I see where you are discounting your bills, you are coming out of it." And they later came on out to the store. I can't discount bills very often.

Q. This may be true, Mrs. Carrier, but it does not respond to the question. That is not a credit report. We are speaking of a rating of a good payment on a credit report.

A. I don't know. Don't you consider Dun & Bradstreet a credit organization?

Q. Yes, but I don't consider what they tell you on the telephone to be a credit report, and I am limiting my question to a credit report.

A. They were fine enough to come out and show me their written reports as to what they were publishing about me.

Q. Did you have a rating of good payment?

A. I haven't the remotest idea of how Dun & Bradstreet rate.

Q. Now Mrs. Carrier, this is the transcript of the pre-trial examination (Mr. Catlin indicates transcript).

The Witness: Isn't that what I just got through saying?

(Testimony of Irene M. Carrier.)

Q. (By Mr. W. E. Catlin): Is that what you mean? A. Yes. Might I say something?

Q. Yes, ma'am.

A. Or is it permissible?

The Court: That is all right. Go ahead.

The Witness: How could I have, Mr. Catlin, any kind of a credit rating? I was in a mess. I was paying off \$49,000. Who could expect me to be discounting bills?

Mr. W. E. Catlin: I understand, Mrs. Carrier, and while I know this, I have to ask you the questions and get answers to them.

(A short intermission.)

Mr. W. E. Catlin: I believe there will be no further questions.

The Court: That is all, unless you have something further.

Mr. Licht: No. We haven't anything further at this time, your Honor.

The Court: You may step down.

Mr. Licht: I will call Mr. Halfyard, please. [112]

BYRON M. HALFYARD

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: May we have your full name for the record, please.

The Witness: Byron M. Halfyard.

Direct Examination

Q. (By Mr. Licht): Would you state where and by whom you are employed, Mr. Halfyard?

(Testimony of Byron M. Halfyard.)

A. Lyon Furniture Mercantile Agency in Los Angeles.

Q. And how long have you been so employed?

A. Since October, 1948.

Q. And in what capacity are you employed?

A. As a credit reporter.

Mr. Lindenbaum: Will you talk out so we can hear you, please.

The Court: A credit reporter, isn't that right?

The Witness: Yes.

Q. (By Mr. Licht): In connection with your job as a credit reporter, did you have occasion to make a series of reports on Irene Carrier?

A. I did.

Q. And would you tell the court when you made the first of those reports? [113]

A. The first report as shown here was on January 22, 1953.

Q. And that was on Irene Carrier doing business as——

A. This was Frank N. Carrier, Jr., the predecessor of Irene Carrier.

Q. As a matter of fact, you had some prior, earlier reports on Mr. Carrier, did you not?

A. That is the earliest one I have a recollection of, the earliest one I have here is January 22, 1953.

Q. Do you know whether there had been some earlier reports, during 1952, 1951?

A. I know there were some previous reports,

(Testimony of Byron M. Halfyard.)

but I don't know the date. I know them by the report in front of me.

Q. Tell me when they were?

A. It indicates there was a previous report, at least.

Q. Now, when was the first report that you have on Irene M. Carrier?

A. That was on December 29, 1953.

Q. Excuse me. I think you have a March——

A. Let us look back here.

Mr. Lindenbaum: If your Honor please,—Mr. Halfyard, will you speak up, please. We can't hear you over here.

The Court: All right.

The Witness: Yes, sir.

Q. (By Mr. Licht): Is December, 1954, the first report [114] you have on Mrs. Carrier?

A. December, 1953.

Q. December of '53, and is this the report (indicating)?

A. That is correct, sir.

Q. And did you prepare that report?

A. I did.

Mr. Licht: May I offer this report, your Honor, at this time?

The Court: Yes.

Mr. Lindenbaum: If your Honor please, the complaint relates to two reports on which they base their cause of action. The first report is March 23, 1954. The second report is April 18, 1955. I respectfully object at this time to going into any

(Testimony of Byron M. Halfyard.)

other reports, other than those that were mentioned in the complaint.

Mr. Licht: Your Honor, we were not aware of any other reports until substantially subsequent to the filing of the complaint, and in view of the additional reports which are shown by his file, we intend to ask permission to amend the complaint to include allegations as to these reports which I believe, if the court will examine, will show they are substantially the same and along with showing a series of acts of a similar nature.

The Court: Counsel states he didn't know anything about these and he wants to amend the complaint more or less to [115] conform to the proof.

Mr. Licht: That is correct.

The Court: With that statement I will overrule the objection.

Mr. Licht: Will you mark this?

The Court: You can do that orally tomorrow morning or you can do it in writing by filing an amendment.

The Clerk: Plaintiff's Exhibit No. 8 is in.

(Said document was marked Plaintiff's Exhibit No. 8 and was received in evidence.)

Mr. Licht: Do you have another copy of this?

The Witness: I don't, sir.

Q. (By Mr. Licht): Now, referring to this report, Plaintiff's Exhibit No. 8, I am going to read the second paragraph where it says, "It is learned that Irene M. Carrier has had no previous experience in the retail furniture business and that a

(Testimony of Byron M. Halfyard.)

Manager is employed to operate the business.”
Could you tell me at this time where or how you got that bit of information?

A. This information must have been available to me at the time I wrote the report.

Q. Well, from what sources of information available to you when you write the reports?

A. From a local credit agency, from the banks, from suppliers. Those are the principal sources.

Q. Is there anything in your file, now, which would indicate where you got that information?

A. I believe there isn't.

Q. Do you have any independent recollection of where you got that information?

A. I believe “It is learned that Irene M. Carrier has had no previous experience” referred to prior to the time the business was commenced by her husband.

Q. Do you know when the business was commenced by her husband?

A. I couldn't state the date exactly, but I could look at the previous report and tell you.

Q. Please do, if you can.

A. August 1, 1946.

Q. So that your testimony, then, that the statement there that Irene Carrier had no previous experience refers to the time before 1946?

A. I would think so, sir.

Q. Well, isn't it true that this is the first report on Irene Carrier, in 1953?

A. This report on Irene Carrier was a continu-

(Testimony of Byron M. Halfyard.)

ation report of Frank N. Carrier. It was never written up as an original report, but a revision of Frank N. Carrier, Jr.'s report, and the given names had merely been changed. It was the same business as far as it had been in the same family. [117]

Q. Prior to that time it apparently had been owned by Mr. Carrier? A. Yes, sir.

Q. Is that what your report disclosed?

A. Yes, sir.

Q. And sometime in between the time of your prior report and this report, Mrs. Carrier had become the owner, is that apparently the situation?

A. I am not sure that I understand it. I understand that Mrs. Carrier took over the business from Mr. Carrier, the same business.

Q. And that would be sometime in between those same two reports, isn't that true?

A. That is correct, sir.

Q. So it is your testimony, then, that in this 1953 report, December, 1953 report, that this statement with reference to her previous experience refers to prior to 1946, is that correct?

A. I would take it to mean that.

Q. And would you also take it to mean that there was some information in your file that disclosed that prior to 1946 she had no experience in the field? A. I believe so, yes, sir.

Q. But there is nothing in the file, now, of that nature? [118]

A. As far as I have been able to see, there isn't.

(Testimony of Byron M. Halfyard.)

Q. You have gone over the file pretty carefully, I assume, have you not?

A. I would say yes, sir. I might make a remark about the files. They are in constant use and any piece of information could be mislaid or misfiled.

Q. I want to ask you a couple of questions about that file. In your office, do you keep a file on a firm like Irene Carrier, you have one file for her, or do you have a series of files?

A. The current file is in one folder on Irene Carrier. Previous information we have that has been used to compile a report is filed in another folder, a folder that would contain all other reports compiled that date.

Q. How do you mean? I don't understand what you mean.

A. Well, if this report were compiled today on Mrs. Carrier and we use certain information that we had compiled, the report, other reports compiled in the same way in the office, the information used to compile those reports would be put in the file dated today. So that if we needed information on Mrs. Carrier, we would merely take out the folder dated today and look through it and pick out her name.

Q. Well, except for the file you have in front of you at this time, are there other files in the Lyon Company files, wherever that is, on Mrs. Carrier? [119] A. I presume not.

Q. Well, is that, then, all the information avail-

(Testimony of Byron M. Halfyard.)

able to you at this time with respect to Irene Carrier? A. I would say yes, sir.

Q. And is that also all the information with respect to the department of your firm known as the collection department?

A. No, sir. The collection department has their own file, a different system.

Q. Well, is that part of the file that you have in front of you?

A. The information here would come from the collection department. It should contain all the information the collection department has now.

Q. You know, don't you, that there were a series or a number of claims that were turned over to Lyon's for collection in 1953, against Mrs. Carrier's account? A. Yes.

Q. And is that disclosed in your file?

A. I would have to examine the reports to see mention of them.

Q. I am not talking about the reports. I am asking you about just the file itself, the fact that matters were turned over to Lyon's for collection.

A. I presume there were. I don't know. I am not sure [120] about that. Yes, there would be, from this letter here, that indicates that that is correct.

Q. This letter which I just pulled out of the file? A. Yes.

Q. It is a letter from David E. Wilson, attorney in Phoenix, to your organization, dated November 7th, with a stamp of November 9, 1953.

(Testimony of Byron M. Halfyard.)

Is that a letter that you received, that your firm received? A. Yes, sir.

Q. And this letter pertained to collection of certain accounts that you had turned over to him, is that correct?

Mr. Lindenbaum: When you say "you," are you referring to the witness individually?

Mr. Licht: I am referring to the firm of Lyon's.

Mr. Lindenbaum: To the firm of Lyon's?

Mr. Licht: I am not referring to him individually at all.

The Witness: This letter indicated collection items, I would say yes.

Q. (By Mr. Licht): All right, now going on from this point of collection for a minute, in your job of reporting to the member companies, would you just tell me exactly what the purpose of a credit report is that you make?

A. The purpose is to give our subscribers as complete a picture as we can as to the advisability of granting credit. [121]

Q. And in giving a report like that to your subscribers, is it your attempt to disclose to them all the information then available to you about this person's credit?

A. All of the information we think would be pertinent to a credit man's decision.

Q. And to use rather commonplace terms, would that include both good information and bad information? A. I would say yes.

Q. Would you consider it a part of your job in

(Testimony of Byron M. Halfyard.)

reporting on retailers to discard the good and just report the bad? A. Absolutely not.

Q. Or to report it all? So that if you were doing what you would consider a proper job of reporting, you would report all the information available, is that right? A. That is correct.

Q. And from what sources, now, would you get that information?

A. As I mentioned before, we get it from the suppliers, the banks——

Q. All right, let us take the suppliers first. How do you get information from the suppliers, write to them and ask them for it?

A. We have a form that we send to the suppliers, such as this form here. [122]

Q. And that form I presume asks them what history they have had?

A. How long the account has been sold, how much is owing, how much their high credit is, their manner of payment and the remarks regarding the account.

Q. And that is one of the items that you then put in a report, is that correct? A. Yes, sir.

Q. And you also check with the bank, if you know it, isn't that right?

A. That is correct, sir.

Q. And if the bank replies to you something with respect to the size of the account you forward that information, don't you?

A. Often they may furnish more information than that.

(Testimony of Byron M. Halfyard.)

Q. Whatever information they give, you report, is that right?

A. If we think it is pertinent.

Q. And in a case such as this, where the person is from another state—and I presume you have no office in Phoenix, do you? A. No, sir.

Q. —then, do you from time to time hire local representatives to report?

A. That is correct. [123]

Q. And did you do that in this case?

A. We did, sir.

Q. And did you get such a report?

A. We have had reports from Phoenix a number of times, from an agency there.

Q. And did you get one in March of 1954, if you know?

A. Well, I would have to examine this, to see.

Q. I think I saw one, that is the reason I am asking you.

The Court: Ordinarily we adjourn at this time.

Mr. Licht: I can certainly continue tomorrow. I did find it, anyway.

The Court: Do you want to put it in now?

Mr. Licht: Identify it.

Q. This document, which is on the form of Lyon Furniture Mercantile Agency, is dated February 23, 1954 and addressed to Southwest Credit Bureau in Phoenix. Is that one of the forms that you sent out? A. Yes, sir.

Q. And did you receive that back from them?

A. I presume on March 5, 1954.

(Testimony of Byron M. Halfyard.)

Q. And you presume that because there is a red stamp with that date on it, is that right?

A. Yes.

Q. And that would indicate the date it was received by [124] your office? A. Yes.

Mr. Licht: I would like to offer that next in order.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit No. 9 in evidence.

(Said document was marked Plaintiff's Exhibit No. 9 and was received in evidence.)

The Court: Then, we might recess for today. We will start at 10:00 o'clock tomorrow morning. At 12:00 o'clock tomorrow we will see how we are going along. Maybe we will take up again at 1:30, then, if we see we are short of time.

Mr. Licht: I anticipate, your Honor, that the plaintiff's case should be completed before or by noon tomorrow.

The Court: We will see how we get along.

Mr. Lindenbaum: And we have one or two witnesses and we should be through in the afternoon.

The Court: Well, we continued that other case until Thursday morning.

The Clerk: Until Thursday morning.

Mr. Licht: That will be just right.

Mr. Lindenbaum: Yes.

The Court: Well, we might guess it about right. It doesn't make any difference.

(And thereupon, at 4:03 p.m., an adjournment was taken until the following day, May 15, 1957 at 10:00 a.m.) [125]

Wednesday, May 15, 1957, 10:00 a.m.

The Court: You may proceed.

Mr. Licht: Will you take the stand again, Mr. Halfyard.

BYRON M. HALFYARD

called as a witness on behalf of the plaintiff, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Licht): Now, Mr. Halfyard, I believe when we ended yesterday we were talking about this report of December 29, 1953, which is Plaintiff's Exhibit No. 8, and I will ask you to look at it. I want to ask you a couple of questions about it. A. Yes.

Q. Would you tell me by examining that report what the rating was you had given to Mrs. Carrier?

A. 13-6.

Q. And what does 13 mean?

A. Inquire for Report.

Q. Does it have any other significance beyond that?

A. That is the only rule—that is the only definition shown in our reference book and the only known definition that I know for 13.

Q. So, when you assign a 13 to a store, that just means [128] Inquire for Report?

A. That is the official significance of it, yes.

Q. And is that what you intend when you write it down? A. That is correct, sir.

Q. And what does the 6 mean?

(Testimony of Byron M. Halfyard.)

A. Very slow payments.

Q. So that was the rating that you had assigned from the information that you had available to you at that time, is that correct? A. Yes, sir.

Q. Now, the next report, when was the date of the next report after December 29, 1953?

A. The next one I have in front of me here which I believe was the next one was March 9, 1954.

Q. Well, do you have anything in your file to indicate that there were any reports in between?

A. No, sir.

Q. And it is your best recollection that that is the next report?

A. That is the next one, as far as I know.

Mr. Lindenbaum: Your Honor, may I call the court's attention to that objection I made yesterday and the court's ruling that today there will be a motion made to amend the complaint.

The Court: Yes, he was going to do it either orally or [129] in writing, he said last night.

Mr. Licht: Yes.

Mr. Lindenbaum: Will it be understood that as far as the record is concerned, that any question with reference to reports other than of March 23, 1954 and April 18, 1955, we object to.

The Court: Yes.

Mr. Lindenbaum: Thank you.

The Court: And I understood you were going to amend orally or in writing.

Mr. Licht: I am, your Honor, but first I have to find out what reports there are.

(Testimony of Byron M. Halfyard.)

The Court: That is right.

Q. (By Mr. Licht): Then, this next report is March 9, 1954, is that correct? A. Yes, sir.

Q. And is that these two pages?

A. Yes, sir.

Mr. Licht: You can staple them together. I offer these, if your Honor please, as plaintiff's exhibit next in order.

The Court: They may be received.

The Clerk: Plaintiff's Exhibit No. 10 in evidence.

(Said document was marked Plaintiff's Exhibit No. 10 and was received in evidence.)

Q. (By Mr. Licht): Now, examining this report, Mr. [130] Halfyard, apparently the same paragraph is in it with respect to her having no experience and employing a manager. As far as you know, did you have any additional information with respect to that, at this time?

A. Not that I recall, sir.

Mr. Lindenbaum: May I call to the court's attention that Mr. Licht undoubtedly unintentionally misread that statement. It says "no previous experience." It does not say "no experience."

Mr. Licht: The wording is "no previous experience," that is correct.

The Court: All right.

Mr. Lindenbaum: Thank you, sir.

Q. (By Mr. Licht): In this report it says, "Since acquiring this business, Irene M. Carrier has not been disposed to furnish financial statements

(Testimony of Byron M. Halfyard.)

direct." Now, do you recall where you got that information?

A. Well, we at the time of an inquiry send out a statement blank to the subject being investigated and also, periodically, we send statement blanks to all names listed in the reference book.

Q. And didn't you also send this Plaintiff's Exhibit No. 9, which was your Lyon inquiry report from the Southwest Credit Bureau?

A. Yes, sir. [131]

Q. And I believe it states on there, doesn't it, that Mrs. Carrier refused to give a report, isn't that true?

A. That is correct, sir.

Q. Does that refresh your recollection as to where you got that particular bit of information?

A. This information came from the Southwest Credit Bureau. It states so right here.

Q. And is that how you included it in this report of March 9th?

A. Well, at the same time we had sent an inquiry presumably to Mrs. Carrier direct.

Q. Do you have a copy of that inquiry in your file?

A. If that statement blank hadn't been returned to us that would be the last we would have seen of it.

Q. Do you know whether or not you did in fact send one to Mrs. Carrier?

A. I don't know, but it is always the policy at any time of an inquiry to send a No. 1 form, a request for a statement. That is our main hope of

(Testimony of Byron M. Halfyard.)

receiving a financial statement. We would undoubtedly do that.

Q. Well, when you sent this form to the Southwest Credit Bureau, one of their functions would have been to ask for a report, too, wouldn't it?

A. That is correct, sir.

Q. And they apparently did and apparently the report [132] indicates that they were refused, isn't that correct? A. That is correct.

Q. Now, did you have available to you this report of March, this Plaintiff's Exhibit No. 9 which bears your received stamp of March 5, 1954, when you wrote this report of March 9, 1954?

A. I presume so, but I wouldn't know for sure.

Q. Was it a part of your file at that time?

A. That I wouldn't know. It should have been.

Q. One of your functions in preparing a report was to send to the Southwest Credit Bureau for information, is that right?

A. The clerk would do that.

Q. Working under you? A. Right.

Q. Now, your next report is dated March what, March 23rd, I believe? A. March 23rd.

Q. Is that this report (indicating document)?

A. Yes, sir.

Mr. Licht: May I offer that, your Honor, as plaintiff's exhibit next in order.

The Court: Yes.

The Clerk: Plaintiff's Exhibit No. 11 in evidence. [133]

(Testimony of Byron M. Halfyard.)

(Said document was marked Plaintiff's Exhibit No. 11 and was received in evidence.)

Q. (By Mr. Licht): Now, on your March 9, 1954 report, will you tell the court what your rating was of Mrs. Carrier at that time?

A. Also 13-6.

Q. Now, on your March 23rd report, which is now Exhibit No. 11, what is your rating of Mrs. Carrier on that report? A. 13-6.

Q. Now Mr. Halfyard, in your opinion is a 13-6 a correct rating for Mrs. Carrier, under the circumstances then present?

A. I would think so, yes, sir.

Q. Were you aware at the time you wrote those three reports that a certain arrangement had been made with creditors for the extension of the payment of past due accounts?

A. At the time the March 23rd report was written, it states here that Irene M. Carrier was granted an extension.

Q. So that you were aware of that, weren't you?

A. I was aware of that.

Q. Isn't it a fact, Mr. Halfyard, that the correct rating for somebody who has signed or made any such arrangement as that would be a 13 and not a 13-6?

A. I would think that that was a matter of opinion. As a rule, a 13 is given, but if slow payments were present, [134] I should think a 13-6 would be applicable. I don't think there is any hard and fast rule.

(Testimony of Byron M. Halfyard.)

Q. Wasn't it your opinion at the time you gave your deposition that a 13 and not a 13-6——

A. I think I said that in my opinion that a 13 would be——

Q. Well, has your opinion changed since then?

A. I don't think so. I don't think there is a great deal of difference between the two ratings.

Q. What does 13 mean?

A. Inquire for report.

Q. What does a 6 mean? A. Slow.

Q. And you testified I believe a few minutes earlier that a 13 had no connotation other than the fact just inquire for report?

A. Inquire for Report is the official connotation.

Q. Which doesn't mean anything good or bad as far as the person is concerned, does it?

A. It draws attention to the fact that the report should be inquired for and the credit man should make up his mind, after reading the report, as to what he does.

Q. And I will state again that the 13 in and of itself doesn't mean anything good or bad, it just means inquire for report, is that correct? [135]

A. That is the correct official connotation of the report, of the rating.

Q. Therefore, would you say that a 13 or a 13-6 would have been a proper rating during this period for Mrs. Carrier?

A. I would say so, yes, sir.

Q. Which one?

A. In most instances, a plain 13.

(Testimony of Byron M. Halfyard.)

Q. Then, why was a 13-6 in this instance proper?

A. I wouldn't remember. I wouldn't have any reason to know.

Q. Have you anything in your files to indicate how you learned there was an extension agreement between Mrs. Carrier and her creditors?

Mr. W. E. Catlin: One minute, please.

Mr. Licht: Sir?

Mr. W. E. Catlin: May I have a short conference with Mr. Licht?

The Court: Yes, sir.

(Whereupon Mr. Licht and Mr. W. E. Catlin conferred off the record.)

Q. (By Mr. Licht): Now, it appears, Mr. Halfyard, that there was as a part of your record, and I am sure that is correct, a copy of this extension agreement which was apparently attached to Mrs. Carrier's deposition, so we can wait a minute on that, and go on. [136]

Now, going on, so we can get the record complete while we are waiting, what is the date of the next report, Mr. Halfyard?

A. The last one we had was this one here (indicating document).

Q. This was March 23, 1954?

A. March 23, 1954.

Q. I believe it was April, 1955.

A. April 18, 1955 is the next one I happen to have here, yes.

Q. As far as you know, is that the——

(Testimony of Byron M. Halfyard.)

A. As far as I know, yes, sir.

Mr. Lindenbaum: Mr. Halfyard, I couldn't hear you.

The Witness: As far as I know, the report of April 18, 1955 was the next report compiled, to that of March 23, 1954.

Mr. Licht: And I would like to offer this, your Honor, as plaintiff's exhibit next in order.

The Court: All right.

(Said document was later marked as Plaintiff's Exhibit No. 12.)

Mr. Licht: And I will hold it until the clerk returns.

Q. Now Mr. Halfyard, it appears from this report that the rating is a 13, rather than a 13-6, is that correct? A. That is correct.

Q. Now, would you tell the court why there was a [137] change made?

A. Well, usually after an extension there is a 13 rating assigned without a credit rating or a capital rating. I don't know of any hard and fast rule, but that is usually the procedure we follow.

Q. Now, in this report which will be Plaintiff's Exhibit No. 12, of April 18, 1955, the third paragraph reads, "During November 1953, Irene M. Carrier was granted an extension by her creditors. The extension agreement called for monthly payments of \$1,000," and so forth. Could you tell me where you got that bit of information?

A. Not directly. It must have been at my disposal at the time I wrote the report.

(Testimony of Byron M. Halfyard.)

Q. And it appears to be from what counsel says, and I think right, that you had a copy in your file of the extension agreement——

A. I believe so.

Q. Did you not? A. I believe so.

Q. As a matter of fact, there is still a copy that has been typed on your stationery in there, isn't there?

A. I haven't seen it this morning.

Mr. Licht: Excuse me. Your Honor, may I open this?

The Court: Yes.

The Clerk: It is the deposition of Irene Carrier. [138]

(The envelope containing said deposition was opened.)

Q. (By Mr. Licht): Now, here is an exhibit to Mrs. Carrier's deposition as the copy that counsel said was part of your file. Is that familiar to you?

A. That appears to be the same as this one here.

Q. And it is dated September 16, 1953, is that correct? A. Yes, sir.

Q. Now, do you have any way of telling when you came into possession of this document? I am not trying to mislead you or anything. Would it appear to you that you were in possession of that document when you wrote this paragraph referring to the agreement in the April 18, 1955 statement? A. It would appear so.

Q. And also in the March 23, 1954 report?

A. Yes, sir.

(Testimony of Byron M. Halfyard.)

\$1,000. Payments were made as agreed up to February 23, 1954."

Now, up to that point in that paragraph, does that refer to the moratorium?

A. Yes, the point the paragraph is bringing out is the moratorium and referring only in a general way to the extension which was in effect. We wouldn't reiterate or [141] repeat the extension agreement. That was already known.

Q. How was it known?

A. If it weren't known, it was brought to anyone's attention by the first paragraph there. The pertinent information there is the moratorium.

Q. At any rate, you didn't disclose the other terms of the agreement other than the fact that she was to pay a thousand dollars a month, she paid it for two or three months and then she stopped, is that right?

A. That is correct, sir.

Q. Do you think it would be important information for you to disclose, if you knew, how much the indebtedness was and how much had been paid on it?

A. I think it would be important enough to put in the report. I don't think at that particular time in March, when that report was written, it was important enough at that time. This particular paragraph refers to the moratorium. That was bringing it up to date.

Q. Now, your firm had placed with it for collection certain items by member organizations, had it not?

A. Yes, sir.

(Testimony of Byron M. Halfyard.)

Q. And one of the functions of your organization is to be paid a fee for collecting these items, isn't that correct? A. Yes, sir. [142]

Q. And in this case, do you know what your organization did with these claims that it had?

A. You want to know specifically if they were collected or not?

Q. No, not yet. What I want to know, what I am trying to get at is that you turned them over to an attorney in Phoenix, didn't you?

A. We turned them over to an attorney for the creditor, who acts for the creditor. We do not employ an attorney ourselves, in that capacity.

Q. Well, he was the attorney, Mr. Wilson in Phoenix, wasn't he?

A. He was an attorney used by the various other people that I know of who use him for similar work.

Q. Well, Lyon's used him for collection work, too, didn't they?

A. Well, sir, the creditor of Lyon, the creditor used him for collection, employed him. Lyon does not employ an attorney.

Q. As I understand the creditor employed him at your suggestion, didn't they?

A. I don't know what recommendations are made.

Q. Isn't it a fact that Mr. Wilson reported the progress of these collections to your office?

A. That is correct, sir. That is correct. [143]

Q. Well, that would indicate, wouldn't it, that

(Testimony of Byron M. Halfyard.)

you had forwarded the matters to him, wouldn't it?

A. I believe that is correct.

Q. All right. Now, I believe you have in your file a letter from Mr. Wilson with respect to these payments, which is dated December 18, 1953 and is stamped—it is dated December 16th and stamped December 18th. Have you ever seen that letter before? A. Yes, sir.

Q. Was that letter a part of the file when you prepared the March 1954 reports and the 1955 report? A. I wouldn't know, sir.

Q. Well, wouldn't the date stamp indicate that it was part of the file?

A. That would indicate that it had come into the office, to the collection department.

Q. Where else would it be, if it wasn't in the file?

A. The collection file and the credit file are two separate entities.

Q. And do you make use of the collection file?

A. Yes, sir, a copy of anything important to the credit department is given to the credit department.

Q. Now, have you read that letter? Will you please read it?

(The witness examines document.) [144]

A. Yes. I have read it.

Mr. Licht: Now Mr. Clerk, the April 18, 1955 report was the next in order which should have been marked. I would like to offer this, your Honor, as the plaintiff's exhibit next in order.

Mr. Lindenbaum: May I see it, please?

(Testimony of Byron M. Halfyard.)

Mr. Licht: Yes.

The Clerk: No. 12.

The Court: No. 12 received.

The Clerk: Plaintiff's Exhibit No. 12 in evidence.

(Said document was marked Plaintiff's Exhibit No. 12 and was received in evidence.)

Q. (By Mr. Licht): By the way, so that we can continue, Mr. Halfyard, does your file indicate whether or not these claims that were placed for collection with your firm were collected?

The Clerk: Plaintiff's Exhibit 13?

The Court: Yes.

The Clerk: Plaintiff's Exhibit 13 in evidence.

(Said document was marked Plaintiff's Exhibit No. 13 and was received in evidence.)

The Witness: I know there were claims collected. I don't see any of the slips here I usually get to indicate they were.

Q. (By Mr. Licht): Well, as I recall in your deposition you testified there were some eight or ten or twelve loose [145] slips in your file which indicated that the accounts had been collected; do you recall that?

A. If I said that, that was so at the time, yes, sir. I don't see them here now.

Q. Perhaps we can look for them at the recess and let us go on with the other point. I would like to ask you again whether or not you feel that it would have been an important part of your report to inform your members whether or not Mrs.

(Testimony of Byron M. Halfyard.)

Carrier was living up to the terms of the agreement of extension when you prepared the March 9, 1954 report?

A. If I had had that information I think it would have been important.

Q. So that your testimony, then, is that if you had that information you would have included it in the report?

A. That would depend on the circumstances at the time. I don't know how important it was at the moment.

Q. Well, referring to this letter from Mr. Wilson of December 16th, first reading the first sentence of the second paragraph:

"The payments that were received were pursuant to the agreement which the creditors signed and under this agreement the debtor is to pay from now on \$1,000.00 on the 15th of each month, which is to be distributed among all of her creditors. I understand there are about sixty creditors." [146] Then skipping to the third paragraph:

"I understand Mrs. Carrier has just made her second \$1,000.00 payment and that therefore in a few days we should receive the distribution."

Now, do you feel that if you had had this information available to you when you prepared the March 9th report, you would have included it.

Mr. W. E. Catlin: Objection, your Honor, I feel that this is argumentative inasmuch as in direct testimony Mrs. Carrier testified that she did not

(Testimony of Byron M. Halfyard.)

live up to the terms of the agreement in making a payment in March.

The Court: I will overrule the objection. You may answer. You may answer the question.

The Witness: What was the question again, Mr. Licht?

Q. (By Mr. Licht): The question is, if you had had available to you when you prepared the March 9th report the information that at that time Mrs. Carrier was living up to the agreement, would you have included it in your report?

A. At this time I would think that I would have included it in my report.

Q. Wouldn't you, as a matter of fact, have considered it an important bit of information to hand on to your subscribers?

A. I would have thought it would have been more unusual if she hadn't lived up to the agreement. The agreement [147] had been made. There was nothing said that the agreement hadn't been lived up to. In the next report we bring out the fact that she, after three payments, asked for a moratorium.

Mr. Licht: Yes.

The Witness: An agreement was made. I see no reason, in thinking it over, why we should have stressed the point that she was living up to it. It was taken for granted that she was living up to it.

Q. (By Mr. Licht): Now, referring to the second page of the March 23, 1954 report, under "Trade Investigation": it says, "During the latter

(Testimony of Byron M. Halfyard.)

part of 1953, payments are reported to have been slow."

Would you show me in your file some of those trade investigations in the latter part of 1953?

A. Yes, sir. (The witness indicates documents.)

Q. Now, here is this first one which says, "Subscriber No. N633." That refers to one of your subscribers, is that correct?

A. Yes, that is correct.

Q. Now, that is dated December 7, 1953, isn't it? Would you say, what does that disclose?

A. Nothing.

Q. And this one, No. 137 on the same date, what does that disclose? A. C.O.D. [148]

Q. And 10-22, it says "Slow," "30 days, slow."

A. 30 days and a high credit of \$700; slow, 30 to 90 days; slow, 90 days; placed for collection.

Q. This was a C.O.D.? A. C.O.D.

Q. Now, I see here a letter dated September 22, 1953, addressed to you, from David E. Wilson, which says in the first paragraph, "I enclose an extension agreement which is self-explanatory." Would that be the agreement that we talked about earlier, that is a copy that is attached to Mrs. Carrier's deposition? A. I would think so, yes.

Q. And here is a letter also from Mr. Wilson of October 8, 1953, further discussing the question of the distribution, and so on, and it says, "At this time there is a 43 per cent distribution check awaiting action by creditors." Is that correct?

A. That is correct.

(Testimony of Byron M. Halfyard.)

Q. And was that information available to you when you made the reports after that?

A. These letters were sent to the collection department and I don't know if I had received a copy of that time or not.

Q. But they were in the collection department, weren't they?

A. They were in the collection department.

Q. Now, I believe in your report of April 18, 1955, there is a paragraph which I would like to read to you:

"Irene M. Carrier, through her attorney, during August, 1954, offered creditors a 50% compromise settlement, both on open accounts and those accounts that were in judgment. Some of her creditors are reported to have accepted this offer."

Will you please tell me where you got that bit of information? That is one of the exhibits that is in evidence.

A. Yes. I don't seem to have a copy of that. I don't have any recollection of it, excepting it must have been in my possession at the time I wrote the report.

Q. But it isn't in the file now, is it?

A. As far as I know, it isn't.

Q. Well, you have spent some time in preparing to testify in this case, haven't you?

A. Not too much time, no.

Q. Well, have you read the file?

A. Not all of it. I have gone through it several times, but—

(Testimony of Byron M. Halfyard.)

Q. As far as you know, there is nothing in that file which would indicate an offer of a 50 per cent compromise settlement, is there?

A. As far as I know, there isn't.

Q. And that would apply to both open accounts and to [150] accounts that were in judgment, isn't that correct?

A. I don't have a copy of that report in front of me now.

Q. Of what report?

A. Of what you are reading there.

Q. Of April 18, 1955.

A. I looked through it already and I haven't seen a copy, but it may be still here.

Q. It may be over here on the clerk's desk.

A. I have it here.

Q. Oh, you do have it? A. Yes, I do.

Q. Now, that appears to be somewhat different than this photostat that I have, and that paragraph seems to have been deleted, is that true?

A. That is the last paragraph of the April 18th report. This is a corrected first page of that report.

Q. When did you correct that first page?

A. I wouldn't know the date, because there is no date on the report, the date that it was corrected. The date on the report is the same date as the original one that was written on that date.

Q. Now, do your records indicate to whom the original April 18, 1955 report was sent?

(Testimony of Byron M. Halfyard.)

A. I believe so. We have a record of every report [151] that is mailed out.

Q. Well, do you have a separate record for the April 18 report that was sent out before the revision was made and after the revision was made?

A. When the report is sent out, the folder is stamped with the date it was sent out and to whom.

Q. Is there any way you can tell——

Mr. W. E. Catlin: Mr. Licht, and if your Honor please, I have just been advised that we have another letter that got out of the file in some way. I don't know how it did.

The Court: All right.

Q. (By Mr. Licht): Is there any way you can tell, Mr. Halfyard, what persons received this uncorrected April 18th report?

A. I could tell you everybody received any—the report, all the reports, but I may not be able to tell you who received that report, unless it was stamped a day or two after it was written.

Now, if this report were written April 18th and the corrected report was compiled two days later, and the folder were stamped two days later, it would indicate that they had received the corrected report. I wouldn't be sure which report they had received.

Q. Do you know why it was corrected?

A. I don't know, sir. [152]

Q. Were there any other corrections made other

(Testimony of Byron M. Halfyard.)

than the deletion of that paragraph of which I spoke earlier?

A. Well, I'll—you have the original one there. That is the only one I noticed when I looked at the report that you had.

Q. Now, I refer you, if I may, to the September 22, 1955 report, which would be some six months or so later, isn't that correct?

Mr. Licht: Your Honor, I would like to offer this, which is the uncorrected April 18th report as next and then the corrected one as the following exhibit, if I may.

The Clerk: No. 14.

The Court: Yes, received.

The Clerk: Plaintiff's Exhibit No. 14 in evidence.

(Said document was marked Plaintiff's Exhibit 14 and was received in evidence.)

Mr. W. E. Catlin: With your Honor's permission I would like to add this letter to the file.

The Court: Yes, you may do so.

Mr. Licht: What letter?

Mr. W. E. Catlin: Apparently this letter is not in the file. There is an original signed copy of it.

The Court: Well, let Mr. Catlin add it.

Mr. Catlin: Thank you.

Q. (By Mr. Licht): Now, where is this April 18th report? [153]

A. You asked for the September 22nd.

Q. Yes, and first the April 18th. This is the corrected April 18th, right?

(Testimony of Byron M. Halfyard.)

A. That is right.

Mr. Licht: Now, this is the next in. The September what?

A. September 23rd, but I don't see that here. It is possible that it is here.

The Clerk: This will be your No. 15?

Mr. Licht: Yes.

The Clerk: Plaintiff's Exhibit 15 in evidence.

(Said document was marked Plaintiff's Exhibit 15 and was received in evidence.)

Mr. W. E. Catlin: Do you have your Exhibit No. 14 there, you say?

The Clerk: I have 14 as a photostat.

Mr. Licht: That is right. That is the uncorrected April 18th?

The Witness: April 18th.

Q. (By Mr. Licht): Well, to save a lot of time, I have a photostat of the September 22, 1955 report. I will ask you to examine that and see if that is one of the reports you made?

A. I didn't personally make this report.

Q. That was a report made by your organization—— [154]

A. Yes, sir.

Q. ——of Mrs. Carrier's business, wasn't it?

A. Yes, sir.

Q. Now, I will read the second part of the second paragraph of that report, which says, "During August, 1954, Irene M. Carrier is reported to have offered creditors a 50% compromise settlement on balances due both on open account and accounts which were reduced to judgment."

(Testimony of Byron M. Halfyard.)

Where did you get that information?

A. I didn't write that report, and previously when you asked me that question as referring to the other report, I don't recall where I got the information, but it must have been available to me at the time I compiled the report. I didn't compile that one.

Q. Now, in that report you refer to—now I am looking at the April 18, 1955 report, it says:

“Collection Record: During 1953, eight items of collection were placed with Agency.”

And that is also included in the September 22, 1955 report, is that right?

A. That is correct. I recall that, that is right.

Q. Now, what does that mean to you, Mr. Halfyard?

A. We only publish, as a rule, the details of a collection item for two years, and after that we just mention [155] that one item or two items were placed for collection over a period of years; it might go back any number of years.

Q. And do you ever mention in there whether or not the matters were paid or not?

A. Never in a paragraph of that type.

Q. You never mention in a paragraph whether they were paid?

A. It is presumed that they were paid. They refer actually to slow payments. It's a trade report of the business at that time. That is past history.

Q. Well, would you report that they weren't paid, if they weren't paid?

(Testimony of Byron M. Halfyard.)

A. No, not after two years.

Q. Well, this wasn't after two years; this is still '54, is it not, and '55, I believe.

A. This was '55, and the report was '55, and this was during '53.

Q. Well, if you read that as a credit man or if you wrote it, would you intend to convey that it was paid or that it wasn't paid?

A. In reading this to me it would mean that they were paid.

Q. And you would never in a report on a situation like that report that it was paid?

A. No. I have never known that to be done.

Q. All right. Now, was your territory the Arizona territory?

A. That and a number of other territory.

Q. I am going to show you another document which appears on the stationery of Lyon-Red Book and it says at the top, "House of Enchantment, Tucson, Arizona, April 1, 1955" and ask you if you have ever seen that report on that concern?

A. I wouldn't know, sir.

Q. That is your territory, isn't it?

A. It doesn't mean that I report—there are several other people who do report in that territory. While it is ordinarily my territory, it is no more my territory than Washington or Nevada or any other western state.

Q. Will you *please* the paragraph of that under the wording "Collection Record"?

(Testimony of Byron M. Halfyard.)

A. Yes, sir. "June 29, 1954, Claim" so and so. Do you want the number?

Q. No.

A. (Continuing): "\$186.75 placed with Los Angeles office for goods sold from March 3rd to March 17, 1953, collected by Agency July 24, 1954."

Q. So this is an example of where you did report to the people that they were collected?

A. That was within a year. We list them whether they are collected or not within a two year period, all the details [157] just like that, but, when you go back beyond two years we say 15 items or one item and so forth, for that one year. That is past history. The credit man isn't interested excepting knowing how in a general way the bills were paid during that time.

Q. I believe you testified a few minutes earlier, Mr. Halfyard, that you never report whether the items are paid or not?

A. Oh, no, sir. We always——

Mr. Lindenbaum: One minute.

The Witness: Yes, sir.

Mr. Lindenbaum: Your Honor, although this witness is an adverse witness, concededly he has not shown any hostility and I respectfully submit that the attorney for the plaintiff cannot argue with the witness but must accept the witness' answers unless he shows he is a hostile witness.

The Court: Well, he called him under that section, but I think maybe we can proceed all right.

(Testimony of Byron M. Halfyard.)

The Witness: I will be glad to clear up that point, Mr. Licht.

The Court: All right, we will let him clear up that point.

Mr. Licht: All right.

The Witness: For two years we list a collection item in detail. When the item is paid, it is listed as collected by [158] Agency, collected by attorney, and so on, and on the date it is collected. After two years, the item is listed as one item or two items, whatever the case may be, were or was placed for collection during that year, and the detail is not given or whether it was paid or not.

Q. (By Mr. Licht): Now, will you show me where in the 1953 reports you mentioned anything about items being placed for collection with your firm?

A. There are no items in that report.

Q. I show you December 29, 1953 report and I read under "Collection Record," "No collection claims placed against Irene M. Carrier." Would that cover the year 1953? There was only one more day left in the year, wasn't there?

A. I would say so at that time.

Q. So that December 29, 1953 you had no information available that any items were placed for collection against Mrs. Carrier, at that time?

A. It would appear so from this report.

Q. Now Mr. Halfyard, do you know what Mrs. Carrier's rating is today with your firm?

A. I think it is——

(Testimony of Byron M. Halfyard.)

Mr. Lindenbaum: One minute. I object to that as being incompetent, irrelevant and immaterial to the issues in this case, what her rating is today.

Mr. Licht: Your Honor, if I may be heard, the purpose [159] of it is only to lay a foundation for asking the next question which I hope to find out in another question. My understanding is that the rating is substantially changed. I would like to find out what information he has had since that time to change it, it being my point that there was no other information and therefore it follows that the rating she now has would have been the proper rating at the first time.

The Court: I will overrule the objection. You may answer.

The Witness: The rating is 13-P-2.

Q. (By Mr. Licht): What does that mean?

A. 13 means Inquire for Report. P means moderate financial responsibility. 2 means prompt payments as an average.

Q. What information do you have at this time which gave you to make that rating?

A. Well, information available to us; we have known and show in our reports that Mrs. Carrier's financial condition, condition of her business has improved. We have our trade checks to indicate the trend of her payments, that they have improved from slow to prompt.

Q. And that is what your trade checks indicate?

A. That is what our trade checks indicate. I haven't written this report recently, but we only

(Testimony of Byron M. Halfyard.)

base a "2" rating on information received from suppliers. [160]

Q. Now, the September 1955 report, Mr. Halfyard, I believe that sets forth a balance sheet which I presume was supplied by Mrs. Carrier, wasn't it?

A. This report, as I said, I did not compile it. It would indicate that it came by mail.

Q. From Mrs. Carrier most likely?

A. From Mrs. Carrier.

Q. Now, what is meant in the report by the words "current and liquid ratio"?

A. Liquid ratio means the ratio between the current liabilities and the adjusted current assets.

Q. By current liabilities you mean those liabilities which are payable within a period of say 30 days?

A. No. Within a period of twelve months.

Q. So that anything that is due within twelve months after the date of the balance sheet would be current liabilities, correct?

A. For the current year, yes.

Q. And current assets would be what?

A. Cash receivables for a 90-day period and merchandise inventory.

Q. Now, taking the cash receivables and merchandise inventory——

A. Cash adjusted receivables.

Q. Adjusted receivables? [161]

A. Right.

Q. Which means they would make an allowance for cash?

(Testimony of Byron M. Halfyard.)

A. No. It would only be a quarter. On installment accounts that were due over a period of a year, we would regard a quarter of those as being due current or collectible within 90 days.

Q. And discount say three-quarters of the receivables? A. That is correct.

Q. All right. So we take a quarter of the receivables, the cash, and the merchandise, and those are the actual assets?

A. The current assets.

Q. And you would balance that as against the liabilities which would include all items due within a year, is that correct? A. That is correct.

Q. Now, what in your opinion in a rating would be a good ratio between those, as a favorable ratio?

A. A favorable ratio would be if the total current assets equaled a hundred and the total current liabilities were less than a hundred, that would be the liquid ratio.

Q. And when would you consider it a good liquid ratio?

A. Well, it improves right up to the point where they are all assets and no liabilities.

Q. All right. Well, would you consider two to one, [162] that is, if the current assets were twice as much?

A. One to one is the borderline. It is considered normal.

Q. And if the current assets were twice as much as the current liabilities, would it be considered a good one?

(Testimony of Byron M. Halfyard.)

A. It would be considered a two to one ratio.

Q. Would you consider that a good one?

A. That would be a fairly good one.

Q. Well, what would be an accepted standard?

A. If the assets say in round figures were ten thousand and the liabilities two or three, it would be a very good one.

Q. What is meant by this term "accepted standard"?

A. By one to one; in other words, the current liabilities did not exceed the adjusted current assets.

Q. So that anything where the current assets—

A. That is the liquid ratio you are asking me about, now—

Q. We are talking about the liquid ratio.

A. Yes.

Q. As long as the liquid current assets exceeded the current liabilities, you would say that was about the accepted standard?

A. That is correct.

Q. For current assets. [163]

The Court: We will stop and take the morning recess at this time.

(Recess.)

The Court: Just come to order. Have the witness resume the stand.

Q. (By Mr. Licht): Now Mr. Halfyard, I think when we left off before the recess we were talking about report of September 22, 1955. I don't believe it has been offered, your Honor.

I would like to offer it as Plaintiff's Exhibit 16.

(Testimony of Byron M. Halfyard.)

The Court: No. 16. Received.

The Clerk: 16 in evidence.

(Said document was marked Plaintiff's Exhibit 16 and was received in evidence.)

Mr. Lindenbaum: You are offering an exhibit in evidence?

Mr. Licht: Yes, the September 22nd report.

Mr. Lindenbaum: Of September 22, 1955?

Mr. Licht: Yes.

Mr. Lindenbaum: Your Honor, it is understood there is the same objection as to any report not pleaded.

The Court: Yes, that is right.

Mr. Lindenbaum: It consists of a report subsequent to the action, it having been instituted already.

The Court: Yes. I will overrule the objection.

Mr. Lindenbaum: Exception. [164]

Q. (By Mr. Licht): And we were talking about this question of current ratios. Now, am I correct in saying that accepted standard, as used in your organization for current ratio would mean that the current ratios as you define them would be at least equal to the current liabilities as you defined them?

A. That was liquid ratio you were talking about.

Q. All right, liquid. Now, is that the correct definition of liquid? A. That is correct.

Q. What is the correct definition of current?

A. Two to one.

Q. The accepted standard for current ratio

(Testimony of Byron M. Halfyard.)

would be that the current assets, as you defined them, would be at least twice——

A. That is correct.

Q. ——the current liabilities as you define them, right?

A. Oh, you have used the words liquid and current sometimes to mean the same thing. There is just a slight difference. In the liquid ratio it is the cash and the adjustable receivables as compared to the current liabilities.

In the current liabilities, it is the cash and the adjusted receivables and the merchandise in relation to the current liabilities. [165]

Q. At any rate, the accepted standard for what you refer to as current would be two to one.

A. Two to one for current.

Q. And liquid would be one to one?

A. One to one.

Q. Now, I am going to ask you to examine this information contained in this report of September 22nd and tell me what the liquid ratio is as appears from that statement?

A. I would say the liquid ratio was above standard.

Q. Well, what would you say in terms of dollars, roughly? Just round it out.

A. I would say it was 1,800 to 4,500.

Q. 4,500 for assets? A. For assets.

Q. And 1,800 for liabilities? A. Right.

Q. And so would you say that the current ratio

(Testimony of Byron M. Halfyard.)

was also above standard or above, to use your statement? A. I would say so, yes.

Q. Now, I am going to show you the report of April 18, 1955, which you did prepare, didn't you? You prepared this report, didn't you?

A. Yes, I did.

Q. Now, that appears to be the same financial information, because it refers to March 20, 1955, doesn't it? [166]

A. It's the same statement.

Q. That is the same statement. So your testimony would be the same as to that, wouldn't it?

A. That is correct.

Q. Would you please tell me how you concluded, when you wrote the statement with this phrase: "Current statement shows liquid and current ratio sub-standard, but net worth ratio above the accepted standards."

A. That is not correct.

Q. Now, there is one thing that seems to be not clear in my mind, Mr. Halfyard, and I would like to, if I may, just read a few paragraphs from your deposition and ask you if this is correct now. I am reading from page 14, line 12:

"Q. I show you a letter dated December 16, 1953, from David E. Wilson to your firm and stamped by your firm December 18, 1953, which is attached to your report of December 29, 1953, and ask you to examine that, if you will.

"(Witness examines document.)

"A. Yes, sir, I have examined it."

(Testimony of Byron M. Halfyard.)

Now, this is that same letter, is it not, Mr. Halfyard?

A. Yes, sir.

Q. And would you identify by the tag what its exhibit number is? A. Exhibit No. 13. [167]

Q. All right, I will go on:

“A. Yes, sir, I have examined it.

“Q. Would I be correct in assuming that you had read that report sometime within a few days of its receipt—that letter, I mean, not the report?

“A. No, sir, you wouldn’t.

“Q. Well, wouldn’t you say that it would be part of your job and of interest to you to know whether or not a creditor who had made arrangement about a debt or had made arrangement with creditors for payment was living up to that agreement or not?

“A. There was no mention in the December 29th report of any agreement with creditors, so I presume at that time I knew nothing about it.

“Q. Do you have any idea how these papers happened to become paper clipped together?

“A. These letters are to the Collection Department and I presume they were clipped together because of the nearness of dates.

“Q. But it has nothing to do with the documents used to compile the report; is that correct?

“A. It would appear that the information wasn’t available at the time this report was compiled, as there is nothing in the report to indicate I was aware of the existence of this letter. [168]

(Testimony of Byron M. Halfyard.)

“Q. Wasn’t available to whom?

“A. To me.

“Q. And had it been available to you do you think that it would have been a proper thing to have included in your report?

“A. I would say yes.”

Now, would your testimony be the same today as it was then?

A. Well, I answered that question without giving it thought. It’s pertinent information and ordinarily it would be part of a report, but in this report as we brought out this morning, as I had written, the important thing was to bring out the terms—there was moratorium and she hadn’t lived up to the agreement. It would depend on whether at the time I thought it was important enough to put in. The circumstances would make a difference. Ordinarily it’s information that could be used.

Q. Well, in the March 9th report, Mr. Halfyard, you hadn’t yet received notice of the moratorium, had you, or the request for moratorium?

A. If it were not in the report, we hadn’t received it, I presume, yes.

Q. So then referring to the same questions as to the March 9th report which would be at a period before you knew about the moratorium, would your answers to that be the same [169] as they are in the deposition?

A. The answers I gave in the deposition were at the time what I thought was correct, and they

(Testimony of Byron M. Halfyard.)

would be the same today under the same circumstances.

Q. Now referring again to this form, Plaintiff's Exhibit No. 9, which is a Lyon Furniture Mercantile Agency form, I am going to read from under the heading "General Information," which seems to be on the back side of it, and I will ask you whether or not this you would feel something which would be important to include in your report:

"She has reduced indebtedness from around \$50m," and "50m" I presume means 50,000, "to 15m and in this new location she has a fine opportunity due to location and appropriate type of merchandise."

Is that information you received from Southwest something you would feel of importance to your member firms to report?

A. Well, we would have to weigh that information. We don't always take on face value the information some local agencies give us. It is often at variance with the facts.

Q. Well then, your best recollection would be that you weighed this information and discarded it?

A. If I had seen that information at the time, and I don't recall having seen it, that is a long time ago; that might have come to me some days after the report was compiled.

Q. Well, the stamp on it says "March 5, 1954".

A. Well, that doesn't mean anything. Sometimes the folder isn't available and sometimes there is a

(Testimony of Byron M. Halfyard.)

lot of material that is being looked up at the time. It depends on how——

Q. But before you compile a report, don't you first gather what information there is in your offices?

A. Yes, the file clerks are supposed to put the information in the folder, any information.

Q. If you don't have it in the folder, you don't have it before you, is that correct?

A. That is correct.

Q. Now, on the front of this document, in answer to this question, "Former business connections, or where and in what capacity employed?", it says, "Carrier Furniture Company for many years." What would that mean to you?

A. Was that inquiry sent out on Frank Carrier or on Mrs. Irene Carrier?

Q. You tell me.

A. He is referring I presume to the business Carrier Furniture Company for many years. I would take it that he meant that the business had been in existence—"Former business connections," and where.

Q. "or where and in what capacity employed?" Now, would you take that to refer to the business or to the person? [171]

A. I would take it to refer to the person connected with this business for many years.

Q. And whose name appears?

A. Irene Carrier.

(Testimony of Byron M. Halfyard.)

Q. All right, just one more thing. There is a telegram which I believe you sent.

A. There is one here I saw.

Q. Is this a copy of the telegram that you sent to him requesting that report?

A. I would think so.

Q. And would that refresh your recollection as to whether or not you had this report when you made the March——

A. No, I wouldn't know that.

Q. Doesn't it appear from the telegram that you had asked him for it?

A. Specifically for the information, yes.

Q. And you were waiting for the report until you got the information, weren't you?

A. It would appear that way.

Mr. Licht: I have nothing further.

Mr. W. E. Catlin: Are you through?

Mr. Licht: Yes, you may cross examine.

Cross Examination

Q. (By Mr. W. E. Catlin): You just answered a question regarding the fact [172] that information was at your disposal in the March 23, 1954 report, that Mrs. Carrier had a new location. Is this correct? In 1954.

A. In the report of 1954?

Q. Yes, at the time of the writing of the March 23, 1954 report, I believe you answered that she had moved to a new location, and you were asked whether or not you thought this would be the type

(Testimony of Byron M. Halfyard.)

of information that you would include in the report?

A. I don't recall having been asked the question about her moving at all.

Q. A favorable location.

Mr. W. E. Catlin: Didn't you ask about a favorable location?

Mr. Licht: I read this sentence that did refer to a favorable location.

Mr. W. E. Catlin: Well, I have here a copy of the 1954 report.

A. Mr. Licht just read this from this form here.

Mr. W. E. Catlin: Yes.

A. Yes, that is correct.

Q. Yes, and you stated that in your opinion this type of information would normally go into a report. Now, isn't it true that in the report you did put this information?

A. The report says, "She recently moved to new quarters in a more favorable area for business of this type."

Mr. W. E. Catlin: Thank you.

The Witness: That is correct. [173]

Q. (By Mr. W. E. Catlin): Now let us go back to your background and history, Mr. Halfyard. How long have you been in credit reporting business? A. About 20 years or so.

Q. How long have you been employed by the Lyon Company? A. Since September 1946.

Mr. Licht: Your Honor, excuse me. Before we go into this, I have no objection to the witness be-

(Testimony of Byron M. Halfyard.)

ing continued on, but I would like to have it for the record that he is the defendant's witness and he is called as his witness.

Mr. W. E. Catlin: I am cross examining him.

The Court: He is cross examining him on his testimony. I will overrule the objection. Go right ahead.

Q. (By Mr. W. E. Catlin): And during this entire period with the Lyon Company, what has been your particular function?

A. Principally credit reporting.

Q. How many credit reports do you write a week? A. I would say 60 to 80.

Q. How many credit reports would you estimate, the number of credit reports you have written in your Lyon career?

A. Well, maybe 35,000 as a guess, a few one way or the other.

Q. In your guess, 35,000?

A. Yes, I would say that was reasonable.

Q. In your function as a report writer, what prompts [174] you to write a report?

A. A credit inquiry from one of our subscribers.

Q. From one of your subscribers. Are you familiar with the method under which the Lyon Agency does business as far as credit reports are concerned? A. Yes.

Q. Do you say that an inquiry from a subscriber is the thing that motivates the creation of a report? A. That is correct.

Q. Do you ever write a report for which you

(Testimony of Byron M. Halfyard.)

have not had an inquiry; in other words, do you ever create reports in which there are not inquiries involved? A. Occasionally, yes.

Q. And what is the purpose of these reports?

A. To make the report available to anybody who may inquire in future, any information furnished to us voluntarily by a new person, for example, going into business, coming in and asking to be listed.

Q. I see. Is this report ever sent out to anybody or a subscriber without an inquiry?

A. Not that I know of.

Q. Is there ever general distribution of reports to subscribers?

A. Certain reports are distributed to subscribers who have inquired previously for the report.

Q. But this again is based upon the inquiry for a report?

A. No. It is voluntarily furnished in the case of a new statement coming in and the report is written, it is voluntarily furnished to a subscriber who recently asked for the report, who had originally asked for it, that is correct.

Q. He had originally asked for it?

A. He had originally asked for it.

Q. He had asked for the report to be transmitted to him? A. That is correct.

Q. And this is merely additional information on that report? A. Yes, sir.

Q. Now Mr. Halfyard, I have here what purports to be agreements between Lyon Furniture

(Testimony of Byron M. Halfyard.)

Mercantile Agency and individual concerns, American Furniture Novelty Company, J. S. Greene Company, B. F. Huntley Furniture Company, Fine Arts Furniture Manufacturing Company, Caro & Upright, Inc., Charm House, Ltd., and Sanford Furniture Company. Would you examine these documents and tell me whether or not they were the subscription agreements under which these particular people subscribed to the services of the Lyon Agency?

A. Yes, sir. I saw them as you put them down. Those are the subscription agreements. [176]

Mr. W. E. Catlin: Your Honor, I would like to offer these as defendant's exhibit first in order.

The Court: A.

Mr. W. E. Catlin: Defendant's Exhibit A.

Mr. Licht: I have no objection.

(Said documents were marked Defendant's Exhibit A and were received in evidence.)

Mr. Licht: Could I just ask one question on voir dire as to them?

The Court: Yes.

Voir Dire Examination

Q. (By Mr. Licht): Mr. Halfyard, do you know if these are all of the persons who requested reports on Mrs. Carrier's credit?

A. I don't know, sir. I have never seen those forms before, those particular ones.

Mr. W. E. Catlin: If the Court will bear with me for just a moment.

(Testimony of Byron M. Halfyard.)

(A short intermission.)

Cross Examination—(Continued)

Q. (By Mr. W. E. Catlin): Now Mr. Halfyard, when you receive a request for a report from a subscriber, what procedure do you follow in your normal routine?

A. Well, the inquiry goes to a clerk and the clerk [177] obtains the report folder which is taken to another clerk who determines if the report is ready to be distributed to the subscriber or if it requires additional information; whether it is possible to send it out at all is the first thing to determine; secondly, whether it can be sent out with a further investigation to follow; or whether it can be sent out and complete the inquiry without any more investigation.

Q. Now, you referred to the report folder. Would you please explain to me what you mean by this term?

A. A report folder is an ordinary cardboard folder with the name of the business typed on it and the current master copy of the report in the folder.

Q. Now, this of course, Mr. Halfyard, is assuming that there has been a prior report. What procedure do you follow when you have no prior report?

A. When the inquiry is received we determine whether we have no prior report and if it is established that there is no prior report, we send the subject of the inquiry a form requesting informa-

(Testimony of Byron M. Halfyard.)

tion, a statement blank form and a number of questions, a questionnaire.

Q. I see.

A. We also send to the local bank or several banks if it is a moderate town, a form requesting information from them.

We also ask the person sending in the inquiry for any [178] information he may have and in a great many cases we send it to a local credit bureau or even a national credit bureau that does that type of work.

Q. Am I correct in saying that the replies that you receive from these sources are then the contents of what makes up, from that time——

A. That is correct.

Q. ——your report folder?

A. That is correct.

Q. And when you have one report that has already been issued, then, the report itself goes into the folder?

A. That is right, and the other information is filed away.

Q. When you have a report and in existence and you receive a request for a report from a subscriber and the report is say five months old, would you write a new report for this subscriber?

A. Between five and six months we would write an additional report; and if it were necessary, if the information were important enough, we would completely revise the report.

Q. Now Mr. Halfyard, supposing that in the

(Testimony of Byron M. Halfyard.)

interval of the original publication of a report and the time of this inquiry you had received additional important information from your stated sources, would you revise the report before [179] the five or six month period?

A. It would depend on the importance of the information.

Q. Assuming that it is very important information? A. As a rule, yes.

Q. In other words, if you received information of sufficient import then in your opinion it would be necessary to credit men, you would revise the report if it had been only one week old?

A. That is correct.

Q. Now, supposing you went to your folder and you found that you had very little information and that it wasn't too current, would you simply take this information and create a report out of it?

A. No. We would use every means at our disposal to get additional information, including picking up the telephone and phoning.

Q. Do you as a matter of record make a note or comment in the file any place that you made a telephone call?

A. In pretty near every instance, my telephone notes are on the folder part of the data.

Q. In other words, in the report folder?

A. Not in the report folder, but in the information that has been filed away, which is kept two years.

Q. It would be your handwritten memorandum?

(Testimony of Byron M. Halfyard.)

A. That is correct. [180]

Q. But you would make no special notation on the folder itself?

A. Oh, no, not on the folder, no.

Q. Now, when you make a report at the request of a subscriber, do you make a notation or a record of the fact that a report has been sent to a particular subscriber?

A. The mailing room clerk always stamps the subscriber's number on the folder together with the date that the report was sent.

Q. And this is done in every case?

A. I suppose once in a million it could be missing, but it's a hard and fast rule.

Q. As a matter of rules and custom of the business?

A. Oh, absolutely, because it is more than just a record of that. It is a reference.

Q. I have here what purports to be a folder on the Irene M. Carrier file.

(Mr. Catlin hands file to Mr. Licht.)

Mr. Licht: All right.

Q. (By Mr. W. E. Catlin): Now, I have here a folder entitled "Irene M. Carrier." Is that the folder we have been speaking about in this particular instance? A. Yes, it is the folder.

Q. And does it have notations on the front as to the persons who received reports and the dates they were sent? [181]

A. Yes, sir.

(Testimony of Byron M. Halfyard.)

Q. Can you tell me from this document who—well, let me ask you specific questions on that.

Can you tell me from that folder if a report was sent to Sanford Furniture Company?

A. What is the subscription number of Sanford Furniture Company?

Q. You have the contracts. Oh, excuse me. Will you examine the contracts and see if you have information as to subscription numbers thereon?

A. Yes, sir, I have.

Q. Now, taking the individual contracts and taking the name Sanford Furniture Company, taking the code number on it, will you, on your file, and tell me whether or not a report was sent to them? A. Yes, sir, it was.

Q. That report was sent at the request of the Sanford Furniture Company?

A. Well, this Sanford Furniture Company is a High Point subscriber. The report would be requested of the High Point office. The High Point office would send them the report.

Q. The High Point office would send them the report? A. That is correct.

Q. How do you get the notation? Do they send you a request through on it? [182]

A. A report of this nature, a copy is always sent to the High Point office, and as inquiries are received by the High Point office they are in a position to send copies directly to their subscribers.

Q. Your file, the file in your possession would not reflect this number, then, is that correct, Mr.

(Testimony of Byron M. Halfyard.)

Halfyard? A. This file here?

Q. Yes.

A. Yes, it would, because if the High Point office were requested to furnish a report and they had it in file, they would send it out to the subscriber and also send us a ticket to put the number on our report. If they did not have a current report, they would send to us for a report, and then we would at that time put the number on.

The Court: Well, it is after 12:00 o'clock, so we might adjourn and make it 2:00 o'clock.

Mr. Licht: Your Honor, there is one thing that might be helpful, if he could during the lunch hour identify by number these people listed on their book or something you have.

The Witness: It is right here.

Mr. Licht: I mean there are many names on that page and if you have some record in your office which would tell you the names of each of the manufacturers that received these reports. [183]

Mr. W. E. Catlin: These are the primary records.

The Court: They would like to handle it the way they want to, so I guess you will just have to——

The Witness: We could give you the names of just these here, but——

The Court: Well, make it 2:00 o'clock.

Mr. Licht: All right. Thank you.

(Whereupon at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p.m. of the same day, Wednesday, May 15, 1957.) [184]

Wednesday, May 15, 1957, 2:00 P.M.

The Court: Do you want the witness back on the stand?

Mr. W. E. Catlin: Yes.

If your Honor please, at this time, in order to shorten the procedure, counsel for the plaintiff and I have entered into a stipulation regarding the subscription agreements as they relate to the people named in the complaint. The stipulation will be as follows: That of the eight concerns alleged in plaintiff's complaint who have received the reports, that all of these with the exception of Frederick Cooper Studios were subscribers by contract to the Lyon Agency and received their reports at their specific request from the Lyon Agency under the terms of the contract. Is that correct?

Mr. Licht: Yes, your Honor.

The Court: All right.

BYRON M. HALFYARD

called as a witness on behalf of the plaintiff, having been previously sworn, resumed the stand and testified further as follows:

Cross Examination—(Continued)

Q. (By Mr. W. E. Catlin): Now Mr. Halfyard, I believe you stated that you used a folder in front of you in preparation of the reports which were issued upon the Carrier or Wishmaker Furniture Company? A. That is correct.

Q. And I believe you stated that in preparing

(Testimony of Byron M. Halfyard.)

these reports you relied on inquiries, on the responses to inquiries to people who sold, suppliers?

A. That is correct.

Q. Your inquiries to banking houses?

A. That is correct.

Q. And other types of documentary information that came to you, into the folder?

A. Correct.

Q. Now Mr. Halfyard, will you examine the complete folder you have and withdraw from it any items within this category that you used in creating the reports in question? Well, let us limit it to yourself for the moment. A. O.K.

Q. You have handed me some credit slips. Would you identify those and tell me what they are, please?

A. These are known as our No. 10 trade information inquiry forms.

Q. Mr. Halfyard, how do you get these forms in your file? Where do they come from?

A. These are sent to suppliers of a concern being investigated and they return them to us by mail, giving the [186] information regarding the account, their experience with it.

Q. These are initiated by you or somebody under your supervision? A. That is correct.

Q. Within the reporting department?

A. That is correct.

Q. And are these initiated promiscuously, or only when you are creating or preparing a credit report on some individual?

(Testimony of Byron M. Halfyard.)

A. When we are preparing a credit report.

Q. And did you or somebody under your direction make these slips and send them out for information on the Carrier or Wishmaker House?

A. Yes.

Mr. W. E. Catlin: If your Honor please, I would like to offer these as Defendant's Exhibit B.

The Court: Yes.

The Clerk: Are they received?

The Court: Yes.

The Clerk: Defendant's Exhibit B in evidence.

(Said documents were marked Defendant's Exhibit B and were received in evidence.)

Q. (By Mr. W. E. Catlin): Now, Mr. Halfyard, do you have any letters from banking houses in your file and which you used to create or prepare these reports? [187]

A. There have been letters. Do you wish me to look through?

Q. Would you, please?

(The witness examines papers.)

A. I have one in front of me.

Q. And may I see it, please, Mr. Halfyard.

Do you find any more?

(The witness hands papers to Mr. W. E. Catlin.)

Mr. W. E. Catlin: Thank you.

The Witness: Here is another one.

Q. (By Mr. W. E. Catlin): Now, I have here three letters on the stationery of First National Bank of Arizona, one being dated December 14,

(Testimony of Byron M. Halfyard.)

1953. Did you use that letter in preparing your report of 1953?

A. I don't seem to have a late report of December, '53, here.

Q. Well, the letter was in the file, wasn't it, Mr. Halfyard? A. Yes.

Q. And isn't it true that you have stated that you used all of the information in the file?

A. That is correct.

Q. Would you also take this letter of 1954 out of the file? A. Right. [188]

Q. And this letter of 1955? A. Right.

Mr. W. E. Catlin: I offer these in evidence as Defendant's Exhibit C.

The Clerk: Defendant's Exhibit C, received?

The Court: Yes.

The Clerk: Defendant's Exhibit C in evidence.

(Said letters were marked Defendant's Exhibit C and were received in evidence.)

Q. (By Mr. W. E. Catlin): Now, Mr. Halfyard, do you have any other letters from any other source in the file, that you used in compiling the information from which these reports were prepared?

A. Yes. There are a number of letters here.

Q. Would you withdraw them from the file, please?

I have here a letter on the stationery of Bumsted & Linsenmeyer directed to Craft Furniture Mfg. Co., dated March 9, 1954. This was in your file and used in the preparation of these reports, Mr. Half-

(Testimony of Byron M. Halfyard.)

yard? A. That is correct.

Mr. W. E. Catlin: I offer this as defendant's exhibit next.

The Clerk: May it be received?

The Court: Yes.

The Clerk: Defendant's Exhibit D in evidence.

(Said two-page letter was marked Defendant's Exhibit D and was received in evidence.)

Mr. W. E. Catlin: If you will bear with me a moment, your Honor, I would like to arrange these according to dates.

The Court: Certainly.

Q. (By Mr. W. E. Catlin): I have here letters from David E. Wilson, from November 7, 1953, through April 20, 1955. These you removed from your file? A. That is correct.

Q. And these are your business records used in the preparation of this report?

A. That is correct.

Mr. W. E. Catlin: Your Honor, I would like to offer these as defendant's exhibit next.

Mr. Licht: Your Honor, before they are received, I would like to take the witness on voir dire to question as to certain of these letters.

The Court: All right, certainly.

Voir Dire Examination

Q. (By Mr. Licht): Now, going through these records that were just handed you, this is an original letter, isn't it, from David Wilson to your firm? A. Yes, sir.

(Testimony of Byron M. Halfyard.)

Q. And that stamp would indicate when you had received it in your office, is that correct? [190]

A. That is correct.

Q. And the same would apply to this letter (indicating document)? A. Yes, sir.

Q. How about this particular one, how could you identify when you received that (indicating letter)?

A. I couldn't identify it, excepting that it was in the folder and is a copy of the letter sent by David E. Wilson.

Q. You have no idea of when it got into the folder, would you?

A. No, I wouldn't know the date.

Q. Now, this one (indicating document) is an original letter to your firm, isn't it? A. Yes.

Q. Is there a stamp on that as to when it was received? A. There doesn't seem to be.

Q. Now, this is one (indicating) that has your "Aug 4 1954" stamp on it? A. That is correct.

Q. And this (indicating document) is "Aug 14 1954"? A. That is correct, yes.

Q. And this (indicating) is "Aug 16 1954"?

A. That is correct.

Q. And as to this one (indicating document), this is a [191] copy of a letter?

A. This is a copy from the collection department we would have received.

Q. Well, this is a copy of a letter addressed to Lyon; this (indicating) isn't an original letter, is it? A. That is correct.

(Testimony of Byron M. Halfyard.)

Q. Do you know how long that has been in the file? A. I haven't any idea.

Q. And this one, do you have any idea when—this is also a copy, isn't it?

A. I don't know when it got into the file, but it is not an original.

Q. It is not the original letter?

A. It is not the original.

Q. And that is true of this one (indicating document), too?

A. That is true of that one, also.

Mr. Licht: Your Honor, I have no objection, to those original letters which were received by their firm in the regular course of business, but those which are not identified I object to their introduction.

The Court: I will overrule the objection.

The Witness: There is one more.

The Court: There is one more, Mr. Licht.

The Witness: That is part of the one that he had, your Honor. [192]

Mr. W. E. Catlin: I will offer these as Defendant's Exhibit E.

The Clerk: Defendant's Exhibit E in evidence.

(Said documents were marked Defendant's Exhibit E and were received in evidence.)

Cross Examination—(Continued)

Q. (By Mr. W. E. Catlin): Now Mr. Halfyard, I understand that in the reporting department under the items used there is what is called

(Testimony of Byron M. Halfyard.)

by the trade a blue slip? A. Yes, sir.

Q. Do you have any blue slips in your folder?

A. There are some here, yes, sir.

Q. And can you tell me what a blue slip is?

A. Well, a blue slip is a duplicate of a white slip and indicates, gives the same details on the blue slip that were on the white slip, that is, details regarding a claim.

The blue slip differs only from the white slip in that it has the date the claim was collected.

Q. Is it a carbon copy?

A. It is a carbon copy.

Q. Perhaps you can explain, then, what a white slip is.

A. Well, a white slip is a slip similar to this one I have in my hand, only on white paper, with the details [193] regarding a claim, such as the name of the creditor, the debtor, the amount of the claim, the claim number, the date, and then a stamp or a printed part indicating when it was collected, but that would be left blank until the blue slip comes through.

Q. Let me ask you, when you refer to a claim you are referring to a claim placed for collection?

A. That is correct, sir.

Q. Against a business concern?

A. That is correct.

Q. And did you use the blue slips out of the file in preparing your report on Carrier Furniture or Wishmaker House? A. Yes, sir.

Mr. W. E. Catlin: I would like to offer these.

(Testimony of Byron M. Halfyard.)

The Court: They may be received.

The Clerk: Defendant's Exhibit F in evidence.

(Said documents were marked Defendant's Exhibit F and were received in evidence.)

Q. (By Mr. W. E. Catlin): I understand also that you have another item you term "70 item" that is used in compilation of credit reports?

A. That is a claim, it is a claim, Item 70.

Q. That is a claim item; is this the same as a blue slip?

A. It is the same as a white or blue slip. The white [194] slip indicates a claim has been placed.

Q. Is a 70 item originated only by, for example, a local office, or may it be originated by any office of the Lyon Agency?

A. It could originate in any office.

Q. And would you receive an Item 70 if it was originated, for instance, by the New York office?

A. If it pertained to a debtor in our area.

Q. That is what I mean.

A. In the eleven western states, yes, sir.

Q. They would send you a copy of it?

A. That is correct.

Q. Do you have any 70 items in your file?

A. Well, you have taken all the blue ones away. I can tell by looking at them. I did see one from New York there.

Q. Are there any other than——

A. There is an identifying mark indicating which office they come from.

(Testimony of Byron M. Halfyard.)

Q. I see. Are there any other styles than this blue item in here? A. Any white ones?

Q. Yes, any white ones?

A. There are some.

Q. Here is another letter from a bank.

A. Yes. [195]

Q. Well, that is all right. Are these all you find? A. Those are all.

Q. And would you use this, the information contained on these white items 70 sheets in preparing your report?

A. Yes, until such time as the blue ones were available, yes, sir.

Q. In other words, these are preliminary before a blue slip? A. That is correct.

Q. And did you take these out of your file that you used in preparation of the Carrier report?

A. Yes, sir.

Mr. W. E. Catlin: I offer this as defendant's exhibit next.

The Clerk: Received?

The Court: Yes.

The Clerk: Defendant's Exhibit G in evidence.

(Said documents were marked Defendant's Exhibit G and were received in evidence.)

Q. (By Mr. W. E. Catlin): I noticed, Mr. Halfyard, that you overlooked a letter of the Valley National Bank, at the time you handed me the others. Is this a letter received in response to an inquiry for information by your department?

A. Yes, sir.

(Testimony of Byron M. Halfyard.)

Q. And this letter was in the file that you used in the preparation of the report? [196]

A. That is correct.

Mr. W. E. Catlin: I would like to offer it as a separate exhibit, your Honor.

The Court: All right, as a separate one.

The Clerk: Defendant's Exhibit H in evidence.

The Court: H.

(Said document was marked Defendant's Exhibit H and was received in evidence.)

Q. (By Mr. W. E. Catlin): Now Mr. Halfyard, let us turn to the March, 1954 report.

A. March 23rd?

Q. Yes. A. Yes, sir.

Q. And compare it with the previous 1953 report.

Mr. Licht: There was a March 9th report, too.

Q. (By Mr. W. E. Catlin): Both of the March reports, 1954, and the December, 1953, report.

A. Well, here is the December, 1953 report.

Q. Yes, and you have the two later reports?

A. Here is March, 1954. These reports are not in order.

Q. Do you have those, now? A. Yes.

Q. Now, in this report I would like you to tell me whether or not the later reports, that is the March reports [197] of 1954 reflect that the conditions of the subject's business had improved?

A. It mentions in the "General Information" paragraph about moving to new quarters in a more favorable area for a business of that type?

(Testimony of Byron M. Halfyard.)

Mr. Licht: Which report are you referring to, now, Mr. Halfyard?

The Witness: March 23, 1954.

Q. (By Mr. W. E. Catlin): Have you looked at the entire report?

A. (Witness examines document.) Is that the report you had in mind?

Q. Yes. A. March 23rd?

Q. That is correct. I am speaking of the entire report generally, Mr. Halfyard, and comparing this report with the prior one, is it not true that this report reflects that there has been some improvement in debtor's financial condition and business condition?

A. There are no claims in the later report.

Q. All right. Now, let us compare this 1954 report with the April, 1955 report.

A. I don't seem to have the April, 1955 report.

Mr. W. E. Catlin: Do you have it, Mr. Licht?

The Witness: There were some reports—— [198]

Mr. W. E. Catlin: Do you have the original reports here? Yes, they do. Here is March, 1955.

The Witness: Some of these were exhibits yesterday.

Mr. Licht: Yes, they are in evidence, Mr. Halfyard.

Mr. W. E. Catlin: ——of April 18, 1955. Here it is.

(Mr. Catlin hands document to the witness.)

The Witness: Thank you.

Q. (By Mr. W. E. Catlin): Now, just take a

(Testimony of Byron M. Halfyard.)

moment and check through this report and tell me whether or not this reflects an improvement in the business and standing of the plaintiff Wishmaker House?

A. Yes, I would say it does show an improvement.

Q. Then what in particular reflects this improvement?

A. A statement which indicates a reduction in accounts payable. Do you want me to be specific?

Q. Yes.

A. —of \$49,000 to \$9,700 and settled with creditors for \$3,000. That is a note appearing on the statement. That is from Mrs. Carrier, or her accountant.

Q. Then, in each case, Mr. Halfyard, the subsequent report has reflected the actual improving condition of the plaintiff, is that not correct?

A. That is correct, sir.

Q. Calling your attention to page 2 of the report, Mr. Halfyard, the one of April 18, 1955, would you refer to [199] the very final sentence in the last paragraph headed "Analysis."

A. Yes, sir.

Q. What does this sentence say?

A. "Her affairs have shown considerable improvement."

Q. Now Mr. Halfyard, in your direct testimony you referred to certain standard procedures for determining credit ratings and the meaning of symbols that were used. Now, I have here a little card

(Testimony of Byron M. Halfyard.)

which shows a great number of symbols on both sides. Would you examine it and tell me if these are the standard symbols and their meanings that are used in Lyon credit reports?

A. That is correct, sir, yes.

Q. Now, I note here, Mr. Halfyard, that on one side it shows "12, 13, 21," etc., and that these state, "12 — Business Recently Commenced," "13 — Inquire for Report," "21—Buys small, usually pays cash."

What in particular does the 12, 13 or 21, or whatever it is, refer to in the grading of the report?

A. You mentioned several there. They each refer to a different—12 means new business. 13 means inquire for report.

Q. In other words, each one of these symbols has a definite meaning attributed to it?

A. That is correct, yes, sir. [200]

Q. And this meaning is set forth on this card?

A. That is correct.

Q. I notice on the back side it has "Capital Ratings" and these are A, B, C, and D, etc. These refer to what?

A. To the capital structure, the net worth, the ratable net worth of the business.

Q. I see. And I notice over here on this side you have "Pay Ratings."

A. They refer to the manner in which bills are usually paid as determined by the supplier's report.

Q. Now Mr. Halfyard, I could take any combination off the front of this and combine it with

(Testimony of Byron M. Halfyard.)

any combination on the back of this card, without any symbol being directly related to the other, could I not? For example, I could pick 81 on this side, that says "Chattel mortgage" and put it with "2" which means prompt payment and show that they have an "A" rating, couldn't I? A. Yes.

Mr. W. E. Catlin: I would like to offer this as defendant's exhibit next, your Honor.

The Court: All right, it will be received.

The Clerk: Defendant's Exhibit I in evidence.

(Said card was marked Defendant's Exhibit I and was received in evidence.)

Q. (By Mr. W. E. Catlin): Now, Mr. Halfyard, in your direct examination you stated that you couldn't find in the [201] file where information on the 50 per cent offer to creditors was contained. I have Exhibit E here. I noticed in here is a letter from David E. Wilson to the creditors of Carrier's Furniture Company. Does that letter contain any reference to a 50 per cent offer of settlement?

Mr. Licht: Your Honor, before he answers it, I would like to renew my objection. This is one of the particular letters that he testified to on my voir dire, that he didn't know when it got into the file and had no recollection of anything with respect to it. It is not a letter addressed to him, and I respectfully submit that it is not proper for him to testify with regard to it.

The Court: I will overrule the objection, Mr.

(Testimony of Byron M. Halfyard.)

Licht. I overrule the objection. You may answer.
You may answer.

The Witness: I don't remember the question. This information is contained in the report and it's just about exactly the information that the letter contains, so I believe that I obtained this information from this letter. It is a letter from Mr. Wilson to the creditors, a copy of which I presumably had; otherwise I wouldn't have had the information for the report.

Q. (By Mr. W. E. Catlin): And this letter came out of your report folder?

A. Yes, I see. I couldn't find it this morning when I—— [202]

Q. And it does contain information regarding an offer of 50 per cent settlement?

A. Right, that is correct.

Q. Thank you. Mr. Halfyard, have you ever prior to today met Mrs. Carrier personally?

A. Yes, I did.

Q. And do you recall when and under what circumstances this meeting took place?

A. I don't remember the date, excepting that I would place it in April, 1955.

Q. Do you recall how the meeting came about?

A. Yes. Mr. Abernathy came in my office and said, "Mrs. Carrier from Phoenix is here. Would you get out your credit file and come over to my office," which I did.

Q. Would you identify Mr. Abernathy as he sits in the courtroom, please.

(Testimony of Byron M. Halfyard.)

A. Yes. I identify him. He is sitting down there to your right.

Mr. W. E. Catlin: Will you stand up, please (addressing Mr. Abernathy).

The Witness: That is Mr. Abernathy.

Q. (By Mr. W. E. Catlin): That is Mr. Abernathy? A. Definitely.

Q. And at that time was he an official or in the employ of the Lyon Agency? [203]

A. He was credit manager for the Lyon Agency —collection manager. I beg your pardon.

Q. Collection manager? A. Correct.

Q. Now go ahead.

A. I went in to Mr. Abernathy's office and he introduced me to Mrs. Carrier and Mrs. Carrier and he continued their conversation, and I was only there a few minutes, but at one point there seemed to be a break and I asked Mrs. Carrier if she would care to go over her credit report and she said that she didn't care to, that she knew she was slow. And I asked her if she employed a manager and she said, "No." And about that time I had a long distance telephone call and I left, and that is the only time I have met Mrs. Carrier.

Q. And this was your complete interview?

A. That, as I remember it, was my complete interview.

Q. Now, as a result of this meeting, did you correct or change in any manner any parts of the reports that had previously been issued on her to that time?

(Testimony of Byron M. Halfyard.)

A. I believe after that time, several days or the same day later, I changed the report and deleted the sentence, that she didn't employ a manager.

Q. And did you have any reason for deleting this?

A. Nothing except Mrs. Carrier's word, which I accepted. [204]

Q. In other words, she asked you to delete it and you did?

A. No. She didn't ask me to delete it. She answered my question by saying she didn't have a manager and I deleted it voluntarily.

Q. Now, you, then, did not know Mrs. Carrier personally at the time you wrote the 1953 and the 1954 reports in question? A. No, I did not.

Q. And the April report of 1955?

A. The first report, no, I did not.

Q. In other words, you met her between the time of the first April, 1955 report and the corrected—— A. That is correct.

Q. Now Mr. Halfyard, did you have any personal animosity toward Mrs. Carrier?

A. Of course not. Not the least. I didn't know the lady any more than by name.

Q. Did you have any knowledge of her except through the information contained in your folder?

A. No, none whatsoever.

Q. Mr. Halfyard, at the time you wrote the 1953, '54 and '55 reports, did you believe all the information you put into the reports that you created to be true? A. I did. [205]

(Testimony of Byron M. Halfyard.)

Mr. W. E. Catlin: I have no further questions, your Honor.

Redirect Examination

Q. (By Mr. Licht): Now, going for a minute to the question of the files, Mr. Halfyard, you testified I believe that you have a report file, or some such wording, is that right, a file in which you keep the information covering your report?

A. Yes, sir.

Q. Isn't it true that your organization also has collection files? A. Yes, sir.

Q. And do you have those collection files with you? A. No.

Q. Well, have you examined those collection files in connection with this lawsuit?

A. Not any more than the letters that have been, copies given to me, or the original letters that became part of this folder here.

Q. Now, for instance, this letter from Bumsted & Linsenmeyer, Defendant's Exhibit D, to Craft Furniture which we discussed, that would have been a part of the collection file rather than your report file, wouldn't it?

A. I had seen this letter.

Q. I realize you had, but wasn't it part of the report file? [206] A. Yes, sir.

Q. Or was it part of the collection file?

A. Part of the collection file, I would presume. My writing is on it and I know I had seen it.

Q. Which is your writing on there, please? What does it say there?

(Testimony of Byron M. Halfyard.)

A. "Please get me report. See Paul. 5 payments, Dec. 2 to Feb. 23, Total," so and so.

Q. Now, this red writing that is on there, that is not yours, is it?

A. That is not mine, no.

Q. And these blue slips, Defendant's Exhibit F, they would be part of the collection file, too, wouldn't they?

A. That would be part of the credit file. Those come to the credit department, the white slip first and then the blue slip when it is paid.

Q. Now, when you get the white slip, that means that a matter has been turned over to your organization for collection, is that right?

A. Yes, sir.

Q. And your organization apparently deemed it important enough to notify the credit department, your department, that matters had been turned over for collection, is that right?

A. Yes, sir. [207]

Q. And that is an important part of a report, isn't it? A. That is correct.

Q. And therefore, in making reports following that, you would be interested, would you not, to know when they were collected, if they were?

A. That is correct.

Q. Now, your December 29, 1953 report, which is Plaintiff's Exhibit 8, says that several items had been placed for collection against Frank Carrier; do you recall that, during 1953? A. Yes.

Q. Now, between December, 1953, when this

(Testimony of Byron M. Halfyard.)

report was made, and March 9, 1954, could you tell from these blue slips, Defendant's Exhibit F, whether or not there were any collections completed? In other words, from December through March, December '53 to March '54?

A. There don't seem to be. There is one here that I am in doubt about because the date is smeared and I can't tell, but the other ones were not collected between December, 1953 and March, '54.

Mr. W. E. Catlin: No.

The Witness: Wait. No. No. I would say no.

Q. (By Mr. Licht): All right. Now, will you please tell me why in your two reports of March, 1954 you mention nothing about these collection matters? [208]

A. They referred to Frank Carrier.

Q. So it is your testimony, is it, that these collections we are talking about refer to Frank Carrier and not to Irene Carrier?

A. The ones mentioned in the first part of that report you showed me referred to Frank Carrier. His name was mentioned.

Q. Well then, is it your testimony that as of March, 1954, your reports indicate that there were no matters of collection mentioned against Mrs. Carrier?

A. I would have to look at that again.

There are no claims listed in the March 9, 1954 report against Irene N. Carrier.

(Testimony of Byron M. Halfyard.)

Q. Or in the March 23rd, I believe, is that correct? A. That is correct.

Q. And would it be your conclusion from that, then, that so far as your department knew, there were no claims for collection against her at that time?

A. I would say if there were any claims available to me at that time, they would have been in the report.

Q. Now, I am going to show you the April 18, 1955 report and refer you to where it says, "During 1953, eight items of collection were placed with Agency." Now, what do those refer to?

A. Well, they refer to eight claims placed with the Agency [209] during 1953. It states that there.

Q. That would indicate that there were claims against Irene Carrier placed with the Agency, isn't that correct?

A. They may be against Carrier Furniture Company.

It is hard to separate the claim. The bill was paid by one person and contracted maybe by another person. In other words, it is an old bill that Mrs. Carrier had since paid. I wouldn't be able to differentiate there.

Q. All right now, these blue slips, then, indicate to you that the bills were paid, isn't that right?

A. That is correct.

Q. Now, in examining these, it appears to me that the last date stamped under the word "Collected" is January 7, 1955, on the top one. Now,

(Testimony of Byron M. Halfyard.)

would you look at that and see if that is the latest date on any of them showing those were collected?

A. There is one here that looks like February 16th, 1955. I don't know if it is "'54" or "'55."

Q. All right. Taking that February date, would that be the latest date that any of those were collected? A. That is correct.

Q. And the others would indicate that they were collected a few months just prior to that, in the fall of 1954? A. September of '54.

Q. Wouldn't they? [210]

A. In September, 1954, yes.

Q. So when you prepared this report of April 18, 1955, that would be the first report that you prepared after these items had been collected, isn't that correct, all of them? A. Yes.

Q. Now, would you please tell the Court why it is that you didn't state here when you stated that the items had been placed for collection, that they had been paid?

A. Your Honor, we never state after two years whether a collection item has been paid or not. It is presumed it is paid and it is of little importance as the business is going on, it is still active.

On claims up to two years we give the date of claim, definite information regarding it, and whether it is paid or unpaid.

After two years, we just say in 1953 or 1951 so many items were placed with the Agency for collection. That just gives the credit manager an idea

(Testimony of Byron M. Halfyard.)

of the method of payment, they are presumed to be paid, then. We do not give the impression that that were not paid at all, that they were just slow at that time.

Q. During 1954, what information did your reports contain with respect to these items for collection?

A. Well, there is no mention in the March 9, 1954 of any collections. [211]

Q. And the same for the other March?

A. The same for the March 23rd report.

Q. Now, this letter from Mr. Wilson addressed to your firm, of August 19th, which refers to certain of these 50 per cent offers, begins, "Replying to your letter of August 16"; do you have a copy of that letter of August 16th?

A. I said I didn't have one this morning, sir, but I think there was one found since. That was a letter dated when?

Q. August 16, 1954 from your firm to Mr. Wilson.

A. From our firm to Mr. Wilson——

Q. The letter begins, "Replying to your letter of August 16," and it is dated August 19th.

A. I don't seem to have any letter here, any copy of that.

Q. Is there some other information or other files in your office in respect to this matter that are not in court, Mr. Halfyard?

A. If there are, sir, I don't know anything about them.

(Testimony of Byron M. Halfyard.)

Q. Referring to this letter from Mr. Linsenmeyer, which is Defendant's Exhibit D, I believe you stated on your examination by your attorney, that it was from this letter that you had gleaned the information with respect to the moratorium, is that correct? [212]

A. That is I believe correct, yes, sir.

Q. And that is contained in this paragraph, where it says, "At this time we are requesting for our client a moratorium," is that right?

A. That is correct.

Q. Now, did you not deem it important in reporting on that request for a moratorium to also report the other information contained in that letter which showed the past record of Mrs. Carrier for payment under the agreement?

A. I think the information brought out in this report of March indicated that there was an extension in effect and that payments had been made but a moratorium had been requested. That was the important up to date information at the time the report was written, that a moratorium was requested, then.

Q. All right now, getting on to those cards which you talked about before, which showed that there were some two or three dozen requests for reports, is that correct? A. Yes.

Q. Now, how come some of them have a line through them. What does that mean?

A. That means that, at the time—I presume that it means that when we get one of those 10

(Testimony of Byron M. Halfyard.)

forms back from a supplier and it states, "We haven't sold the account for a year," we cross it off the folder, so we don't send them the [213] same form again; in other words, waste six cents postage to send it to a man who isn't selling.

Q. Do the numbers on there indicate you sent 10 forms to these people or that you sent credit reports to them?

A. Both, both. We use this as a supplier—in most instances the person who asks for a report is also a supplier of the concern.

Q. So when they send for a report, you also send them a 10 form, is that correct?

A. That is correct.

Q. All right. Will you please identify for me the names of the firms that sent for reports during 1953, '54 and '55?

A. Well, '53, '54 and '55. The numbers are here and they mean nothing to me at all.

Q. Well, to whom do they mean something?

A. To a file. We have a cross-file indicating.

Q. Do you have a file in your office which refers each manufacturer to a particular number?

A. To our Los Angeles office, a subscriber to our Los Angeles office only.

Q. And those which are not in the Los Angeles office which are listed here, you couldn't identify them?

A. I couldn't identify them.

Q. Do you know where that information is?

(Testimony of Byron M. Halfyard.)

A. In the individual offices.

Q. So, in order for us to determine each person who received one of these reports, we would have to contact each of those individual offices, is that right?

A. Well, I think that would be a question for our general manager. I don't know if he has the information available in the executive office.

Q. And how many offices does the firm have that you know of? A. Eight offices.

Q. And how many of these eight offices receive copies of these reports on Mrs. Carrier?

A. Any office asking for one. Automatically there are so many offices and——

Q. Well, don't these reports show a distribution where you send them just to various offices?

A. Yes, that is correct.

Q. Like C-H-O-N refers to a report sent?

A. Well, those would be the offices that would get them as a matter of routine, and the other offices would get them by request.

Q. So you send them to four different offices in the beginning, is that right, so they would have one in their local files, is that correct?

A. That is correct. [215]

Q. And from your record, you have no way of telling who the persons are who got reports, then, from those offices, have you?

A. Yes, we would. They would appear on this folder here.

(Testimony of Byron M. Halfyard.)

Q. I mean you can't identify them? The numbers are there.

A. I can't identify them by name. By number only.

Q. Now, you stated to your attorney a few minutes ago, when he asked what information you used in preparing it, you used the phrase, and I wrote it down, "I used all the information in the file," is that correct?

A. Well, if I say I use all the information in the file, it means I looked over all the information in the file and used what I think is pertinent.

Q. And would that mean that you also looked over all the information in the credit file in your office?

A. I am talking about the credit file.

Q. I mean in the collection file.

A. The collection file I wouldn't touch at all. The collection department sends me copies of information that is pertinent to the credit report.

The Court: Is that all, Mr. Licht?

Mr. Licht: Yes. That is all.

The Court: You may step down. [216]

The Witness: Thank you, sir.

The Court: That is all. We will take the afternoon recess.

(Recess.)

The Court: Just come to order.

Mr. Licht: Mr. Davis, please.

The Court: Go right ahead.

NORMAN B. DAVIS

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: Please state your full name for the record.

The Witness: Norman B. Davis.

Direct Examination

Q. (By Mr. Licht): What is your occupation?

A. Manufacturers' representative.

The Court: Manufacturers' representative.

Q. (By Mr. Licht): You are a manufacturers' representative? A. Yes.

Q. In the furniture field? A. Yes, sir.

Q. How long have you been engaged in that occupation? A. Ten years.

Q. And during that course of that time, has one of [217] your accounts been Irene Carrier in Phoenix? A. That is right.

Q. How long have you been calling on her as an account, do you remember?

A. Oh, seven years; seven to eight years.

Q. Now, are you familiar with Lyon Furniture Mercantile Agency? A. I am.

Q. And do you use this Red Book which I have here, in connection with your job?

A. Yes, sir.

Q. That is supplied to you by some of your companies you represent? A. That is right.

Q. And when you are going to call on an account for the first time, say, do you look at Lyon's for their rating before you call on them?

(Testimony of Norman B. Davis.)

A. Normally, yes.

Q. And if you looked in Lyon's and saw a rating of 13-6, would you call on that account?

Mr. Lindenbaum: If the Court please, I object to that question. What this witness would do in connection with a given account is not the test.

The Court: I will overrule the objection.

Mr. Lindenbaum: I respectfully except. [218]

The Court: You may answer.

The Witness: No, I wouldn't call on a 13-6.

Q. (By Mr. Licht): And if the rating was simply a 13, what would you do?

Mr. Lindenbaum: One minute. Again I make the objection.

The Court: Yes. I will overrule the objection.

The Witness: If it were 13, it would bear investigation by either inquiring for a report or taking an order and letting the credit manager of the firm inquire for a report.

Q. (By Mr. Licht): What would you do if the rating were 13-P-2?

A. I have never come across that rating.

Mr. Lindenbaum: May I again make the same objection.

The Court: The same objection. I will overrule the objection. He said he had never seen it.

The Witness: I have never seen a 13-P-2. It would either be a P-2 or a 13-2. There possibly is that rating in Lyon's. I have never run across it. A P-2 would indicate that you could sell it.

Q. (By Mr. Licht): You could sell to a P-2?

(Testimony of Norman B. Davis.)

A. A substantial amount.

Mr. Licht: I have no further questions.

Cross Examination

Q. (By Mr. Lindenbaum): Mr. Davis, do you extend credit yourself? [219] A. No, sir.

Q. Are you a credit man? A. No, sir.

Q. And from whom do you get that book that you mentioned, that you get, a Lyon's Agency book?

A. Those are furnished by the factories in many cases.

Q. Which factories?

A. I represent five firms, and any one of the firms will give you the supplement that pertains to your territory.

Q. Will you mention specifically from whom you get a Lyon's book?

A. American Furniture Novelty Company, Chicago.

Q. And the credit of any given account is passed upon by the credit manager of the American?

A. That is true.

Q. And not by you? A. That is right.

Mr. Lindenbaum: That is all.

Mr. Licht: I have nothing further. May the witness be excused, your Honor?

The Court: The witness may be excused.

Mr. Licht: Mr. Frankel, please. [220]

BENNETT FRANKEL

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: Please state your full name for the record.

The Witness: Bennett Frankel.

Direct Examination

Q. (By Mr. Licht): And what is your occupation, Mr. Frankel?

A. Manufacturer's representative.

Q. What manufacturer do you represent?

A. T. Baumritter Company.

Q. They are a furniture manufacturer?

A. Furniture manufacturers, yes.

Q. What areas do you represent?

A. Southern California and Arizona.

Q. How long have you held that position?

A. A little over ten years.

Q. And in the course of that business, have you had occasion to meet Irene Carrier? A. Yes.

Q. And how long have you known her?

A. I have called on the account about eight years.

Q. And have you taken orders from Irene Carrier during most of that eight year period?

Mr. Lindenbaum: One minute. I object to that question [221] as leading and being incompetent.

The Court: I overrule the objection.

Mr. Lindenbaum: I respectfully except.

The Court: You may answer.

The Witness: Yes.

(Testimony of Bennett Frankel.)

Q. (By Mr. Licht): Now, do you get supplied by your employer with a copy of the Lyon Red Book?

A. Yes, to that section only of the territory that I cover.

Q. And this which I show you is the whole United States?

A. That is the whole United States. I get just that segment that applies to the territory that I cover.

Q. And before you call on an account, say that it is a new account, you look at Lyon's to see what the rating is?

A. Well, that is the purpose we use it for, to determine whom we call on.

Q. And if you looked in Lyon's and found a rating of 13-6 on an account that you had never called on before, would you call on that account?

Mr. Lindenbaum: I object to that question as incompetent.

The Court: I will overrule the objection. You may answer.

The Witness: No. I would not call on an account with that rating. [222]

Q. (By Mr. Licht): And if an account had simply a 13 rating, what would you do with respect to it, if it was the first time and you had never called on them before?

Mr. Lindenbaum: I respectfully object.

The Court: Yes. I will overrule the objection.

Mr. Lindenbaum: I respectfully except.

(Testimony of Bennett Frankel.)

The Witness: In a case where an account is 13, which means "Inquire for Report," I would make my own investigation and probably talk to some of the other salesmen and see if they had been selling the account, and if I felt that just the general information that I got from the other fellows was sufficient, I would call on the account knowing that they had a rating of just 13.

Mr. Licht: I have no further questions.

May I ask just one more question, please?

Q. What about an account which you had never called on before and it had a rating of 13-P-2, what would you do with respect to it?

Mr. Lindenbaum: I make the same objection.

The Court: I will overrule the objection.

The Witness: Well, I would call on a—I have never seen the rating to my knowledge, but I would probably call on it, because a P-2 indicates prompt pay with limited financial responsibility, despite the 13, "Inquire for Report." [223]

Mr. Licht: All right.

Cross Examination

Q. (By Mr. Lindenbaum): You are a salesman, is that correct, sir? A. Right.

Q. And you do not extend credit?

A. I do not extend credit, no.

Q. T. Baumritter Company has a credit manager? A. Yes.

Q. And they look into the credit——

A. Yes.

(Testimony of Bennett Frankel.)

Q. —and pass on the credit? A. Correct.

Q. If you knew that a concern had an extension for the benefit of creditors, would you call on that firm? A. No.

Q. As a matter of fact, Baumritter does sell this plaintiff, doesn't it? A. Yes.

Q. And to what extent, how much, in dollars and cents?

A. The credit department limits the financial responsibility of the people we do business with. We have sold them consistently.

Q. Yes. In this particular case, how much credit does Irene Carrier get from T. Baumritter? [224]

A. That is determined by the credit department.

Q. I am asking you, whether you know?

A. I don't know the exact amount.

Q. As a matter of fact, it is over a thousand dollars, isn't it? A. Yes, it is.

Q. And you do call on Irene Carrier?

A. I do.

Q. And you did call on Irene Carrier despite the 13-6 rating, didn't you? A. Yes.

Mr. Lindenbaum: That is all.

Redirect Examination

Q. (By Mr. Licht): Could you tell the Court why it was that you called on her?

Mr. Lindenbaum: I object to his asking this witness that question.

Mr. Licht: He asked him whether he called on

(Testimony of Bennett Frankel.)

her despite the rating. I would like to have him explain it.

The Court: I will sustain the objection.

Mr. Licht: I have nothing further. May he be excused, your Honor?

The Court: He may be excused.

The Witness: Thank you.

Mr. Licht: I would like to call Mr. Sigerson, [225] your Honor, as an adverse witness.

The Court: Mr. Sigerson.

JOHN J. SIGERSON

called as a witness herein by the plaintiff, being first duly sworn, testified as follows:

The Clerk: Please state your full name for the record.

The Witness: John J. Sigerson.

Direct Examination

Q. (By Mr. Licht): What is your occupation, Mr. Sigerson?

A. General manager of the Lyon Furniture Mercantile Agency.

Q. And your office is in New York, is that correct?

A. The executive office is in New York.

Q. And are you also a partner in this firm?

A. I am.

Q. Now, do you have in your possession any records or part of the file pertaining to Mrs. Carrier, other than has been exhibited in court?

(Testimony of John J. Sigerson.)

A. No.

Q. Are there any records in your New York office that you know of that pertain to that?

A. Correspondence in connection with the case, yes, as it developed.

Q. I am talking about prior to the filing of the lawsuit, that is any of the correspondence or documents that made up part of the file prior to the filing of the lawsuit?

A. Only those that I am telling you about, correspondence pertaining to the suit after it was filed, as well as credit reports in the New York office.

Q. Well, you don't have, then, in your possession, for instance, the letter which I asked Mr. Halfyard about, of April 16th, I believe, 1954 from this office to Mr. Wilson in Phoenix?

A. Do I have any correspondence?

Q. Yes? You don't have that letter, do you?

A. No.

Q. Have you ever seen the letter, so far as you know?

A. Oh, very likely I have seen it if it was in the possession of our counsel.

Q. What I have in mind is this: The letter to Lyon's in Los Angeles is signed by Mr. Wilson and it is dated August 19, 1954, and it says, "Replying to your letter of August 16." Have you seen that letter of August 16th?

A. Not to my knowledge.

Q. Have you examined the files here in Los Angeles, both the credit file and the collection file?

(Testimony of John J. Sigerson.)

A. Not the collection files, not the credit files.

Q. What files have you examined?

A. Just the books and records of the office.

Q. Now, as a partner in this firm, Mr. Sigerson, can you give the court an estimate of the net worth of the partnership of the Lyon's Furniture Mercantile Agency?

Mr. Lindenbaum: I object, if the court please, as being incompetent and irrelevant.

Mr. Licht: One of the issues, your Honor, is punitive damages and I think the cases hold that one of the elements that may be proven in order to determine punitive damages is the value or net worth of the defendant.

The Court: I will sustain the objection.

Mr. Licht: I have nothing further, your Honor.

The Court: Any examination?

Cross Examination

Q. (By Mr. W. E. Catlin): Mr. Sigerson, I believe you stated you are the general manager of the Lyon Agency?

A. That is correct.

Q. Do you know when the Lyon Agency was organized?

A. Yes, it was founded in 1876.

Q. How many offices does it have in your organization?

A. Presently from coast to coast, eight offices.

Q. What is the type of business carried on by the Lyon Furniture Mercantile Agency?

A. The Lyon Furniture Mercantile Agency is a credit reporting agency supplying the mercantile

(Testimony of John J. Sigerson.)

agency service to [228] the credit managers of manufacturers, wholesalers and jobbers in what might be termed the home furnishing industry.

Q. Mr. Sigerson, we have here that has been exhibited several times a credit reference book of the Lyon Furniture Mercantile Agency. Is this a publication by the Agency?

A. That is published semi-annually by the Agency and has been since 1876.

Q. Do you have any idea how many firms are listed in this publication?

A. Roughly over 130,000.

Q. Do you have any idea how many reports are issued by the organization per year?

A. I would say over a hundred thousand.

Q. To whom are reports issued by the Lyon Furniture Mercantile Agency?

A. Only to subscribers under contract who have written in requesting the reports.

Q. In other words, Mr. Sigerson, before a person can obtain the services of the reporting section of the Lyon Agency, they must enter into a contract with you? A. Into a written contract.

Q. And this contract defines the rights and the circumstances under which a report will be granted, is that correct? A. That is correct.

Q. Now Mr. Sigerson, is it true that these reports are [229] only issued at specific request of a subscriber? A. That is correct.

Q. Mr. Sigerson, are you personally acquainted with Mrs. Irene Carrier? A. Yes.

(Testimony of John J. Sigerson.)

Q. Would you tell the court when you became acquainted with her?

A. I met her at her place of business on Memorial Day, May 30, 1955—'56, please.

Q. Would you tell the court, please, how this meeting came about?

A. Yes. One day very early in the year, T. Baumritter, Theodore Baumritter of T. Baumritter & Company, Incorporated, called on me and said he was visiting me at the request of Mrs. Carrier and he knew of the lawsuit. And I asked him what he wanted me to do. He thought we could—he could intervene in some way, and I asked him in what way that he could.

Well, he said, "Why don't you call her up when you get to Los Angeles?"

I visited Los Angeles or the Los Angeles office on the Monday prior to Memorial Day, which I believe was on Wednesday of that week and I telephoned, and she invited me out to see her in Phoenix, and we fixed a date for that Wednesday which was a holiday, May 30, 1956. [230]

Q. This was the only time in your life prior to this trial that you met her?

A. The only time I ever met Mrs. Carrier.

Q. Now, had her name ever come to your attention as an individual prior to the filing of this action?

A. I never heard of Mrs. Carrier prior to that.

Q. Did you have any ill will or malice toward her personally?

A. None whatever.

(Testimony of John J. Sigerson.)

Q. Mr. Sigerson, I would like very much if you would give me the names of the members of the partnership which comprise the Lyon Furniture Mercantile Agency.

A. Yes. There is Mrs. Adalaide J. Lyon. There is John L. Graham, there is Frank A. Gaffney, J. L. Eshelman, also known as Fred Eshelman, Margaret R. Lyon, Clare C. Nevers, and myself, John J. Sigerson.

Mr. W. E. Catlin: That is all, your Honor.

Mr. Licht: That is all.

The Court: You may step down.

The Witness: Thank you.

Mr. Licht: Your Honor, may I have permission to recall the plaintiff?

The Court: Certainly.

Mr. Licht: Mrs. Carrier. [231]

IRENE M. CARRIER

the plaintiff herein, recalled as a witness on her own behalf, having been previously sworn, was examined and testified further as follows:

Direct Examination

Q. (By Mr. Licht): Now Mrs. Carrier, you recall that yesterday I had asked you some questions with respect to the damage which you alleged in your claim. Do you have at this time any way of more specifically fixing the damages than at that time; have you made any calculations?

A. Yes. May I have my purse, please? Thank you.

(Testimony of Irene M. Carrier.)

(The witness removes paper from envelope.)

I made a list here of moneys thrown into that business.

Mr. Catlin: I can't hear you.

Mr. Licht: Would you speak louder, please.

A. I made a list of approximate moneys put into that business in order to keep it open. It was done by refinancing and mortgage on the building, most of it.

Q. And how much additional capital did you put in because of that?

Mr. Lindenbaum: Now, your Honor, I object to the question as being purely hearsay, as not being the best evidence and not binding on this defendant.

The Court: I will overrule the objection. You may [232] answer.

The Witness: I put a total of \$20,100. Some of that was for own personal furniture that I sold, as we were liquidating the business, as I came out of the new house, and it was \$1,675, it was new merchandise. It had been in the new home about three months. I merely threw it back into the business and sold it and threw the funds right into the business. The rest of it was by refinancing a mortgage.

Q. (By Mr. Licht): You did that on more than one occasion? A. Three different times.

Mr. Licht: I have nothing further, your Honor.

Mr. Lindenbaum: No questions.

Mr. Licht: Your Honor, at this time I would like to amend the complaint in paragraph III particularly, to include allegations with respect to re-

ports made by the defendant on March 9, 1954, which is Plaintiff's Exhibit 10, on April 18, 1955, which is Plaintiff's Exhibit 15, and on December 29, 1953, which is Plaintiff's Exhibit 8.

The Court: All right.

Mr. Lindenbaum: If the court please, I object at this time to the plaintiff's motion on the ground that this case has been now pending for approximately two years; that the plaintiff had ample time to amend its pleadings during that two year period of time; that the plaintiff conducted an [233] examination before trial of the defendant and had this information available to it about four months ago; that we came to this court based on the complaint, a written, signed complaint, by Mr. Licht, and prepared to defend that complaint, and I respectfully submit that the plaintiff is guilty of laches and that that motion should be denied.

The Court: Well, I will overrule the objection and let the amendment be made. It is brief, so I just let it be made orally.

Mr. Licht: Thank you.

The plaintiff rests.

The Court: As to those three dates, March 9th, April 18th and December 29th.

Mr. Licht: April 18, 1955 and December 29, 1953.

The Court: All right. Well, we have the dates.

Mr. Licht: Thank you.

The Court: We don't need a written amendment for that.

Mr. Licht: All right. The plaintiff rests.

(Whereupon the plaintiff rested her case in chief.)

Mr. W. E. Catlin: If your Honor please, I believe we only have ten minutes left today, is that correct?

The Court: Yes, sir.

Mr. W. E. Catlin: Of our normal day. And I have a motion that I would like to present to the court at the beginning of our case and it will take me quite a bit longer [234] than ten minutes to present my part of this motion. I am wondering if I might have leave to do this tomorrow morning?

The Court: Well, shall we start at a quarter to 10:00, something like that?

Mr. W. E. Catlin: Yes. I will be glad to.

The Court: That will give you ample time?

Mr. W. E. Catlin: Yes.

The Court: We will adjourn at this time and make it 9:45.

Mr. W. E. Catlin: Thank you.

The Court: All right, 9:45.

(Whereupon an adjournment was taken at 3:50 p.m. on Wednesday, May 15, 1957 until the following day, Thursday, May 16, 1957 at 9:45 a.m.) [235]

Thursday, May 16, 1957, 9:45 a.m.

The Court: Now I will hear from you on the argument.

Mr. W. E. Catlin: At this time, your Honor, the defendant moves that the plaintiff's complaint be dismissed, on the following grounds; and that we

have judgment for the defendant at this time on the pleadings and the evidence, upon the following grounds:

That the plaintiff's complaint and the evidence given before this court are not sufficient to sustain a claim for which relief can be granted, for the following reasons:

In order to sustain an action for defamation, plaintiff must allege and prove that defamatory matter was published and that as a result of such publication damages proximately flowed from same.

In the event the publication is not libelous per se, plaintiff must allege and prove by use of innuendo that the words were understood in a libelous sense and that as a result, specific damages proximately flowed from said publication.

In this particular case, your Honor, the plaintiff has alleged that the defendant published that she obtained the business as a result of marital difficulties and that by innuendo this is a libelous statement.

Also, plaintiff alleges that the defendant stated that [238] she did not have a manager, that she was on C.O.D. basis when in fact she had a good credit rating, and that as a result of these statements and publication she was damaged. However, they do not allege specifically how she was damaged—merely a general allegation of blank money.

(A short interruption.)

The Court: Go right ahead.

Mr. W. E. Catlin: Thank you.

Now, in the evidence given before this court plaintiff concedes that of the eight parties named in her complaint only seven of them were subscribers or received information from the Lyon Furniture Mercantile Agency, and by stipulation they have agreed that each of these seven parties received this information as subscribers under a written contract and by specifically requesting the information from the Lyon Furniture Mercantile Agency.

Now, Section 45A of the California Civil Code provides, and I am not quoting, your Honor, that a libel which is defamatory of the plaintiff without the necessity of explanation or innuendo is said to be a libel upon its face, but if it is not libelous upon its face, if it is not bad, that they must plead and prove special damages as a proximate result thereof.

Special damage is defined in Section 48A of our Code, and are all damages which plaintiff alleges and proves that [239] he has suffered in respect to his property, business, trade, etc.

The evidence given before the court in the present matter shows conclusively that at the time the plaintiff took over the Carrier Furniture Company, there were \$49,000 in antecedent debts which were past due and the plaintiff's own testimony along with the other evidence introduced in plaintiff's case, again shows conclusively that in the intervening period, up to the date of trial of this action, the plaintiff's business has prospered. This also is stated on the face of the complaint, that she has a substantial business at this time. Accordingly,

there has been absolutely no evidence of damage of any kind, either by direct proof or by innuendo.

Evidence of the plaintiff in this matter shows that there has been no ill will or malice, by her own statement. She said that none of the defendants or their employees had any malice or ill will on her behalf.

I would like to return for one moment, your Honor, to the allegation in the complaint on damages. It appears to be the California law, as set forth in *Smith vs. Los Angeles Bookbinder*, 133 C.A. (2) 486, that an allegation that plaintiffs have been injured in trade or business and occupation in a designated sum by reason of publication of alleged libelous matter is an insufficient allegation of special [240] damages.

In the particular case, in the complaint, and in the proof of the complaint, there has been no itemization or bringing out of special damages of any nature. The entire proof and allegation is that she was damaged in a blank sum.

This holding has been upheld in other jurisdictions which I could mention.

Knickerbocker Life Insurance Co. vs. Ecclesine, 34 N. Y. Superior Court 76; *Bell vs. Sun Printing & Publishing Co.*, 42 N. Y. Superior Court, 567; *Peabody vs. Barham*, 52 Cal. App. (2d) 581.

So, upon the fact of the complaint there has been no showing that the material published by plaintiff was defamatory on its face, no allegation with the exception of the marital difficulty that it was understood by innuendo to be defamatory, and upon this

point there has been no evidence at all presented to this court.

On the other points, there has been no evidence presented that these were defamatory. Certainly the fact that a person hires a manager is not defamatory per se. Certainly the fact that a person is on a C.O.D. basis and is slow payment is not defamatory per se.

And furthermore, the evidence presented to this court by the plaintiff admits without equivocation that these are the facts. [241]

When Mrs. Carrier assumed this business ownership, of this business in 1953, she was again \$49,000 in debt, in past due obligations. Of course, she did assume, along with the indebtedness, \$70,000 in assets.

At this time she admits she was either on a C.B.D. or a C.O.D. basis, and that she was slow pay.

She admits that (1) Mr. Carrier had had a manager at one time and that (2) she had somebody running the second budget store for her.

Now, it is also the California law, and I might state that this is the general law of all of the 48 states, either by code or by case law, that under certain conditions a publication requested by an interested party from an interested party is granted a cloak of privilege, a conditional privilege to be sure, and in our particular case this conditional privilege is granted by our Civil Code Section 47, Subdivision 3, which reads in part as follows:

“In a communication, without malice, to a person interested therein, (1) by one who is

also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information.”

Any person falling within this description in our code [242] section is granted a privilege. This privilege can only be removed by the showing of actual malice.

Section 48 of our Civil Code defines malice as ill will, actual malice, not that implied from a publication.

In the event a person falls within the purview of this code section, it is then immaterial that the communication was false or defamatory, unless it was used for a wrongful purpose or with malice as defined, actual malice.

A mercantile agency, your Honor, is a very necessary part of our modern system of business. We have become so big and business so great that it is impossible for one merchant to know all of his purchasers, and in order to grant credit upon a reasonable basis, it has become necessary for specialized agencies to take on the job of specially finding out about retailers, wholesalers, anybody to whom a manufacturer or other party would extend credit. This function has become so important that the mercantile agency per se by our courts has been granted a cloak of privilege. It falls within our code section automatically, but in our case law and the case law of other jurisdictions it has been stated

unequivocally that a mercantile agency is per se granted the cloak of privilege which can only be revoked upon a misuse, wrongful purpose, actual malice, ill will.

In the case at bar the defendant is a mercantile agency and mailed the report to seven of its subscribers on their [243] demand in accord with the terms of a written contract, agreement to furnish such information upon their request.

Hence, clearly the defendant comes within the court's decisions that a mercantile agency is privileged and also would be within the purview of our California Civil Code.

If your Honor please, in the case of Watwood vs. Stone Mercantile Agency, 194 Fed. (2d) 160, 90 U. S. App. (D.C.) 156, 344 U. S. 821, in which the Supreme Court denied certiorari, we had a case where a mercantile agency published the following facts in a credit report.

That a woman, and she was named, was single, that she had a child, and that she had sued a certain named man for breach of promise, when in truth the facts were that she was not single, she did not have a child, and she was the wife of the man they stated she sued for breach of promise. The court held in this case as bad as the statement was, that the mantle of privilege cloak upon a mercantile agency was sufficient inasmuch as there was no ill will or wrongful purpose behind the communication, grossly in error as it may have been, that it did not state a cause of action, and that the mercan-

tile agency was not responsible for a claim based upon a libel suit.

In the New York case of *Ormsby vs. Douglas*, 37 N. Y. 476, there was an alleged libelous statement to the effect that the plaintiff was a man of no responsibility, that he [244] was a bad man and that he worked for counterfeiters and was a counterfeiter himself. There the court said, and I quote:

“The rule is well settled, that a communication, which would otherwise be slanderous and actionable, is privileged if made in good faith, upon a matter involving an interest or duty of the party making it, though such duty be not strictly legal, but of imperfect obligation, to a person having a corresponding interest or duty,”

and they cite another New York case:

“and this principle applies to an agent employed to procure information as to the solvency, credit and standing of another, who communicates confidentially, and in good faith, the information obtained, to his principal, who has an interest in the subject-matter.”

This is *Washburn vs. Cooke*.

In the present case, again it is admitted that these publications were made to persons interested, at their request, under the terms of a written contract, and in no place in the evidence has there been anything tending to show wrongful purpose or ill will on the part of the publishing defendant.

The contracts set forth the duty between the defendant and seven persons to whom this information was published, are in evidence and speak for themselves, your Honor. [245]

Where an alleged libel is privileged, as it no doubt is in this case, the plaintiff, in order to recover, must prove actual malice.

The California courts have held in *Freeman vs. Mills*, 97 C.A. (2d) 161, 166, and in *Snively vs. Record Publishing*, 185 Cal. 565, that even though a statement may be defamatory and false, it is privileged if it is published without malice, and if it affirmatively appears that a communication was privileged, in order to make a prima facie case, the plaintiff must prove the existence of malice.

Locke vs. Mitchell, 7 Cal. (2d) 599.

And if your Honor would bear with me I would like to read the portion of the case under headnote No. 1:

“Privilege must be pleaded as an affirmative defense to an action for libel,”

citing a California case,

“except where the existence of the privilege is disclosed on the face of the complaint.”

In our case, the complaint definitely showed that this was a mercantile agency under contract and invokes the privilege.

In a communication, without malice, to a person interested therein, by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for sup-

posing the motive for the [246] communication innocent, or who is requested by the person interested to give the information, there is this cloak. Those were my words, your Honor.

Again quoting:

“Furthermore, while in the case of a false and unprivileged publication, libelous per se, malice is implied, and lack of it is a matter of defense, which need not be pleaded” (citing cases), “this is not true of a qualified privilege, for section 48 of the Civil Code expressly declares that ‘malice is not inferred from the communication or publication’ in the cases provided for in subdivisions 3, 4 and 5 of section 47. Hence, where the complaint discloses a case of qualified privilege, no malice is presumed and in order to state a cause of action the pleading must contain affirmative allegations of malice in fact.”

This was also upheld by *Snively vs. Record Publishing Co.*, 185 Cal. 565, as I previously cited.

The Court: That is the *Snively* case.

Mr. W. E. Catlin: Courts in other jurisdictions have upheld that the very nature of a mercantile agency in gathering and publishing reports, in the ordinary course of business, rebuts any idea of malice in the transaction, and I will cite *Douglass vs. Daisley*, 114 Fed. 628, 637.

Also, I would like to call to your Honor’s attention the [247] fact that our courts have held in California that mere inadvertence or forgetfulness

or careless blunders is not evidence of malice, nor is negligence or want of sound discretion, nor the mere fact that the statement is untrue. *Davis vs. Hearst*, 160 Cal. 143, 157.

The plaintiff, in all its evidence presented to this court, has shown and based its entire matter upon the fact that perhaps the reporter employed by the Lyon Mercantile Agency who created these reports made several small errors in assembling the reports. It has not been shown that these errors are of any consequence or that they have proximately caused damages in any amount.

One other point, your Honor: Truth is a complete defense to an action for libel, and our California cases are in accord and it is generally agreed that it is not necessary to prove the literal truth of an allegedly libelous accusation in every detail, so long as the imputation is substantially true so as to justify the "gist" or "sting" of the remark, and I cite *Edme vs. San Joaquin County*, 23 Cal. (2d) 146, *Heuer vs. Kee*, 15 Cal. App. (2d) 710, 714; *Dethlefsen vs. Stull*, 86 Cal. Appeals (2d) 499, 506; *Kurata vs. Los Angeles News*, 4 Cal. App. (2d) 224, 227.

The evidence of the plaintiff as submitted on the alleged false statements has not proved that these statements were false generally, but that they were perhaps inaccurate [248] in some detail. Again, the details have been small and again there has been no showing that any damages resulted from the small details.

In summation, your Honor, the defendant is a

mercantile agency cloaked with a privilege, a conditional privilege, unless their publication was tinted with malice or was used for a wrongful or illegal purpose.

There has been no showing that anybody connected with the defendant company had any malice toward the plaintiff.

There has been no showing of any nature that this information was published for a wrongful or illegal purpose.

As a matter of fact, the plaintiff's evidence has shown conclusively that as her credit increased, as her business expanded from the admitted form or condition in which she assumed it, which we grant was a burden, and as she was able to work her way out, we gave her credit whenever credit was due and that our ensuing reports from the original one reflect the upswing in her business.

This in itself in my estimation, your Honor, is excellent evidence of the lack of malice.

Thank you, your Honor.

The Court: All right. Mr. Licht?

Mr. Licht: Your Honor, I find myself in a strange position of agreeing with many of the points made by the attorney for the defendant.

I agree that there were many truthful statements made in these reports and I agree that Mr. Halfyard or any of the partners were certainly not activated by malice at the time they made their reports, since it appears quite obvious that they didn't even know her.

And I also agree that this is their job to report, this is the business they have undertaken.

But after that, I disagree with them on pretty basic issues, substantially on what the law is with respect to their duty and particularly on what he refers to as small errors.

At the time Mrs. Carrier took over this business, it was admittedly in a poor condition. Then she had substantial indebtedness.

Mr. Hill testified that in his opinion if it had gone into bankruptcy, the creditors would have gotten approximately 25 per cent of what they did actually receive, and things were in a pretty bad way. There is no doubt about that. But I submit, your Honor, that under these circumstances which existed at that time which create a duty on the part of the defendant of which we complain, if I am a subscriber and I pay several hundred dollars a year for the services, as those reports indicate the subscribers do, I am not interested in getting a report on Barker Brothers, because I know that if my salesman sells Barker Brothers I am going to ship to them, [250] I am not going to ask Lyons for a report. What I am interested in as a subscriber are the marginal or the borderline people that my salesmen call on, the Wishmaker House in Phoenix, and that is the reason that I subscribe, and when I ask for a report on them, I don't ask them to do the impossible; all I ask them to do is to convey to me the information that they have, and that is all their job is. I don't believe their job is to color it. I don't believe their job is to do

anything but convey to me as a subscriber the information that they have.

Now, I think that under the cloak of the privilege that was discussed, it could well be argued that they had a right under that privilege to report false information, but, and this is where we differ sharply, in reporting false information, if it is, they must report accurately the information they are supplied. This is the whole gist of our case, your Honor.

Our case isn't that this man was going to try to "fix" Mrs. Carrier. He didn't even know Mrs. Carrier, and neither did any of the other parties to this.

Our point is that they in undertaking to report this lady's financial condition, in assuming to determine for suppliers throughout the United States, some hundreds of suppliers that they have, whether or not they should ship to this woman, they have a duty to her as a businesswoman to [251] report the truth that they receive of the information that they receive.

If it turns out to be false, as in the case of the lady that they spoke about who turned out to be married, then, they say, "Well, the only information that we had was this." This isn't our case at all.

Your Honor, there is a case which is exactly like ours, I believe, and that is the case of *Douglass vs. Daisley* which was cited by counsel. In that case the information was that the defendant reported the plaintiff had made a general assignment for the

benefit of creditors, when in fact he did not, and the court, in what appears to me at least to be a learned discussion of the question of qualified privilege, stated:

“Where a false report originates in the office, and is not based upon information, the circumstances and the occasion do not necessarily involve a privilege. Carrying the qualified privilege to communications of the character in question, by rule of law, would be carrying the doctrine of immunity beyond the rule in respect to absolute privilege.”

In other words, the court here said that “if these people are going to pay me to report, I can report anything I want, as long as I don’t know the person, as long as I am not activated by privilege.”

They have a greater privilege even than the absolute privilege allowed to us here in court.

They cite Mr. Bigelow on Torts and a discussion on it. Then, discussing again the further issue of a reporting agency:

“It being a business right, however, or a private right, to gather and impart information to such members of the business world as were its subscribers, it must exercise the right reasonably, to the end that unnecessary harm shall not come to business men about whom the information is furnished. It is not a right which can be exercised heedlessly or carelessly. It is difficult to find a principle of law which would justify the careless and wanton exercise of a right of this character, and afford immunity on the ground of privilege.

It is equally difficult, starting with a privileged occasion, to find a principle which would justify an absolute ruling of law upon the question of liability upon the ground of variance between the information received and that sent, and this is for the reason that the variance may be susceptible of explanation."

So, they say in this case, as I read it, and I respectfully request the court to read it, it is about eight or ten pages long and is right on the very point in this case, that if they take the information that they receive and they [253] faithfully convey it to their subscribers, they are staying within their privilege. But their duty to this person who has no connection with them at all is to report the information that they receive. What information did they receive? They received information that she was in this very precarious condition. There is no question about that. And it would seem to be, your Honor, in doing their duty to their subscribers, they would have reported that.

The Court: Well, Mr. Licht, I don't mean to interrupt you, but I can't take the time out now, and the court has to prepare himself ahead of time, so I will deny the motion and let them proceed with the defense. I will follow up on that case that you have, but I won't take the time to read it right now.

Mr. Licht: It would be the same argument at that time.

Mr. W. E. Catlin: You deny the motion?

The Court: Yes, yes.

Mr. W. E. Catlin: If your Honor please, could we have a five minute recess to obtain our witnesses?

The Court: Certainly.

(Recess.)

The Court: You may proceed.

(Whereupon the defendant, to maintain the issues on its behalf offered and introduced the following evidence, to-wit):

Mr. W. E. Catlin: I will call Mr. Paul Abernathy, your [254] Honor.

The Court: All right, Mr. Abernathy.

PAUL E. ABERNATHY

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Please state your full name for the record.

The Witness: Paul E. Abernathy.

Direct Examination

Q. (By Mr. W. E. Catlin): Mr. Abernathy, what is your business?

A. At the present time I am a credit manager.

Q. Have you ever been an employee of the Lyon Furniture Mercantile Agency? A. Yes.

Q. And what was your position when employed?

A. Collection manager.

Q. Would you tell me the date that you were associated with Lyon and the date that you left?

A. June, 1950, I commenced employment; terminated June, 1956.

(Testimony of Paul E. Abernathy.)

Q. Was the termination of your employment voluntary on your part? A. Yes, it was.

Q. Mr. Abernathy, do you have, or did you have at any time while you were employed as a Lyon Furniture Mercantile [255] Agency employee, and do you have at this time, any ill will, malice or animosity toward Mrs. Carrier or the Carrier Furniture Company? A. No.

Q. Mr. Abernathy, did you ever meet Mrs. Carrier personally? A. Yes, I did.

Q. When was the first time that you met her personally? A. April of 1955.

Mr. W. E. Catlin: That is all. You may cross examine.

Cross Examination

Q. (By Mr. Licht): Mr. Abernathy, when you were the credit manager—the collection manager of Lyon's, did you keep a file on each individual account on which it had matters for collection?

A. Yes.

Q. And was there such an account on the Carrier Furniture Company, that you remember?

A. I believe so, yes, sir.

Q. And have you seen that file recently?

A. No.

Q. Do you recall when I took your deposition several months ago; had you seen the file at that time? A. Previous to that. Not since.

Q. I show you what apparently is a carbon copy of a [256] letter to you signed David E. Wil-

(Testimony of Paul E. Abernathy.)

son, dated August 19, 1954, which is part of Defendant's Exhibit E and you will see that it says:

"Dear Mr. Abernathy:

"Replying to your letter of August 16."

Do you know where that letter of August 16 is?

A. I do not.

Q. Do you have any way of telling from the contents of this letter what was contained in that letter of August 16th? A. No.

Q. Was it your custom in your job to keep copies of letters that you wrote? A. Yes.

Q. And would they generally be in the same file with the answers that you received? A. Yes.

Mr. Licht: Exhibit E.

I have nothing further.

Mr. W. E. Catlin: That is all, Mr. Abernathy.

At this time, your Honor, the defendant will renew its motion and rest.

(Whereupon the defendant rested its case.)

Mr. W. E. Catlin: May we have findings of fact and law in this matter, your Honor? [257]

The Court: Yes.

Well, all I can do on your motion is to deny the motion and submit the matter for the record, that is all I can do.

Mr. W. E. Catlin: That is right.

The Court: In other words, that is all I can do, to keep the record straight.

Mr. W. E. Catlin: That is right.

The Court: And you want findings. Now, do

you want to argue orally at this time? What is your disposition on that matter?

Mr. Licht: Yes, I would just like to argue it very briefly, your Honor.

The Court: All right. You have covered most everything on the motion.

Mr. Licht: I think so. That is correct.

The Court: I might say that I sustained that objection on punitive damages, so I couldn't allow any punitive damages. I disagreed with you on that, so that question will be out on punitive damages.

Mr. Licht: Yes, that is correct.

The Court: So that question will be out, on the question of punitive damages.

Mr. Licht: I thought that was it by the nature of the ruling, your Honor.

The Court: Yes. [258]

Mr. Licht: I only have this request, in summation on behalf of the plaintiff, and that is to examine the information that was available to the defendant throughout this period of great duress on behalf of my client and to ask, as I have asked myself, whether it appears that they honestly reported the information that they had available, and if they did not honestly report it, what damage resulted?

We have just briefly been going over the cards which the defendant had, which indicated certain persons who got reports. That was a matter which was pleaded in our complaint and which was admitted by the answer, and we have also stipulated to it. However, we have just been examining these

cards, and Mr. Linsenmeyer points out to me that in comparing the numbers of the agreements with the cards, it appears that Charm House, one of the ones who we alleged got a report and who the defendant by stipulation admitted got a report, doesn't show on the card. It also appears that Huntley, another one of the same situation, doesn't show on the card.

It also appears that J. S. Greene didn't get a report. I think this is important for only one thing, to show that the cards are not complete.

Mr. W. E. Catlin: Mr. Licht, and if your Honor please, I want to pass once piece of information to Mr. Licht that apparently he does not understand. These cards are only the cards of the Los Angeles office. There are seven other [259] offices with cards of this type.

Mr. Licht: This is one of my points. I am very well aware of that. This goes to show, as far as I see it, that the burden of the plaintiff in attempting to show how she was directly damaged by these reports is almost impossible.

I asked the man who was here how he could tell what persons throughout the United States had received reports, and he said he couldn't even tell from these cards where the numbers had letters like, for instance, "B's" in front of them, which called for a different office than his, what people got it.

I submit, your Honor, that it is obvious that probably every person who Mrs. Carrier contacted to sell her received or got information from Lyon's,

as I know from my own limited experience in the business people do. It is the most natural thing to do, if you are a manufacturer, to find out what Lyon's report has. And it is also most natural, as my experience has shown me, and that is on the question of this balance sheet which is attached to that. Now, I have had it happen to me many times with a client who would say of his own balance sheet, "I don't understand what all these figures are. How am I? What kind of a condition am I in? What is going on?" Because there are so many people who don't really understand them, that is the reason why they hire Lyon's. Anybody could have gotten this balance sheet. It was [260] submitted, as your Honor will see from the evidence, to all of the creditors, some 60 of them, it was also submitted to Lyon's.

But what is important is Lyon's interpretation. That is what they pay them for, and Mr. Halfyard said that it was substandard, it was below their average. That is the important information, to me, to a credit man who is about to extend credit, who says on the witness stand at this time that it is above average. The assets, no matter how he tears them down, show between three and four times the liabilities. But the language doesn't say this.

Now, this 50 per cent thing is kind of important. If I were a credit man and if I saw on a report that somebody offered creditors 50 cents on the dollar on both open accounts and on accounts in judgment, I don't think I would ship to them. This isn't a fact, your Honor, and this isn't a fact as

they knew it. They had the agreement at that time which was in existence showing that she paid 43 per cent on the first payment, and nothing whatever about her paying 50 per cent. On the contrary, all the letters, everything in their file indicates that this woman was trying desperately to settle for a hundred cents on the dollar.

There was never any thought of settlement until a year and a half later, when by her testimony and all of the correspondence it was said that she couldn't get merchandise here, [261] no other choice, but she said, "I will go to my friends and I will borrow \$6,000 and I will give you \$3,000 and I will put \$3,000 in merchandise, if you will settle the balance of \$9,000 for \$3,000." I submit, your Honor, that that is substantially different from settling for 50 cents on the dollar, and I think that these defendants are charged with knowing that, they are charged with knowing what is in their file. I don't think Mr. Halfyard can say, "Well, it was in the credit file, I didn't know about that." That is their organization. He knew perfectly well that there had been items for collection. He also knew that they were paid, but he said, "Well, we don't put that in our report." And I had that written up, because there seemed to be some question about what he said when I asked him about that, because I knew that they do put that in the report, they are in the collection business, too, and that is very fine, but if I were in the collection business and I had items placed with me for collection, I would be proud to report to my—

Mr. Lindenbaum: I think it is out of order for Mr. Licht to say he knew something, unless he took the witness stand and testified, because it is unfair, it is not part of the record, and he is making inferences and innuendos here that are absolutely prejudicial to the defendant.

Mr. Licht: I am arguing the matter, your Honor.

The Court: Yes, I will let him complete his argument. [262] He is arguing on the subject.

Mr. Licht: They were in the collection business, and it seems logical to me, if that is more allowable, Mr. Lindenbaum, it seems logical to me that if I were in the collection business that I would want my customers to know how I did on collections, and I submit by the evidence of the one report which I was able to find, they said right on there, "Collections made by our account," and here is what he said:

"Q. (By Mr. Licht): Well, if you read that as a credit man or if you wrote it, would you intend to convey that it was paid or that it wasn't paid?

"A. In reading this to me it would mean that they were paid.

"Q. And you would never in a report on a situation like that report that it was paid?

"A. No. I have never know that to be done."

And yet, I happened to find a report on an entirely different account which shows that they do that, your Honor, and it is logical that they do that.

Now, I am not going into this in any further detail. I think your Honor can just become as

familiar with the facts as I am, by just reading the exhibits.

But I submit, your Honor, that this is a case where these people have breached the duty that they owed to Mrs. Carrier. They owed her a duty of fair play and they didn't [263] give it to her.

I submit that it is substantial damage and I respectfully request the court to so find.

Mr. Lindenbaum: Your Honor, I would like to address the court and just say a few words.

The Court: Certainly.

Mr. Lindenbaum: Let us take the last point, first, that Mr. Licht brought up about collections.

When a person sells another merchandise on time, such as two per cent ten days, net 30, they legally obligate themselves to pay at that time, and any credit man throughout the United States is very much interested to know as to whether items have been placed for collection, because that means that some creditor had to go to the expense and place items of collection with either the Lyon Agency or with lawyers and that the original time of the debt was not met. That takes care of the importance.

Whether they were ever paid or not may be important to Mr. Licht, but to a credit man, the fact that they had to go to collection, when they don't meet their obligations when they are due, is of utmost and prime importance.

Now, we have contracts, not with Mrs. Carrier. We have contracts with our subscribers.

If we were negligent in connection with a given

subscriber, he might be in a position to sue us for breach of [264] contract. But I submit to your Honor the fact is in this case that we were not negligent at all.

All we did in this case was this: Mrs. Carrier comes with a very sympathetic story that I certainly don't want to go into, about her marital difficulties. All we did in that connection, your Honor, in our report was to say that she had acquired the business as a result of marital difficulties.

They, in their complaint, and on the witness stand, admit that she acquired the ownership of the business as a result of a divorce decree, and it is because we used the words "marital difficulties" instead of "divorce decree," they say by innuendo we say she got the business by coercion and duress. Now, that is certainly stretching the use of language and attempting to create such chaos and confusion that it has definitely no meaning and isn't applicable.

Another thing, your Honor, is this: Mrs. Carrier said something on the stand the other day, that she believes in acts and not words. I commend her. So do I, and every right-thinking person should feel the same way. But what happened in this case is that Mrs. Carrier is the one that is dealing with words, not us. She was a married woman. She had a child of eight and a child of fourteen and yet she wants to convey to the court the fact that while she had two infants that she spent twelve hours a day at the place of business. It is absolutely unbelievable. [265]

When did she for the first time become officially known to the world and to any reporting agency that she owned a business? It wasn't until around September, 1953, and we reported that she was the owner of that business in December, 1953.

She says, she complains about the use of the word "manager." Mr. Catlin has called that to the attention of the court and everybody knows there is no libel about saying a person has a manager in connection with operating a business. She admitted that she had a manager for a period of time. She admitted that her husband had a manager for a period of time. And many multi-million dollar businesses are being operated by managers.

How can she say by innuendo or by any means say that we castigated her by saying she had a manager?

Then, the next complaint she has is that she said we said she was slow pay. Your Honor, it is admitted very clearly in this case, whether it is a sad story or not, it is our duty to objectively report to anybody that may be a thousand or more miles away from the area where they are shipping merchandise. The fact of the matter is, and I am not going to deny it, and I personally have no knowledge of it, that she may have had a tough struggle, she said she was operating the business on a shoestring, she admitted it on the witness stand, she admitted that she was doing the best [266] she possibly could do. She admitted that when she took over the responsibility and obligation of that \$49,000 she was supposed to pay it, but did

she? She didn't pay the \$49,000. She paid a percentage of it, 79 per cent of it. So Mr. Licht says, "Oh, 50 per cent is a terrible thing." We have a letter, and it is in evidence, your Honor, from Attorney Wilson saying that she offered 50 per cent. The letter is addressed to Virtue Brothers here in California. And we have a copy of that letter and it is in evidence, that she did offer 50 per cent, but that isn't very material, because actually, even though she may have struggled, she did not pay her indebtedness in full.

It is our duty objectively to coldly report the credit, the fact that Mrs. Carrier had an extension and did not meet her extension but had this compromise, and it is up to the credit man to decide do they want to gamble with this party or not. It is not up to us. We are not the ones to tell them extend credit or don't. We give them as much information as we have available and we say, "Judge for yourself." As a matter of fact, Mr. Baumritter's representative was here on the stand and he said despite the 13-6 credit, we gave her over a thousand dollars of credit, and he still calls on the account.

The last point, there are only five points in this case, that they complain of in their complaint, all throughout, is [267] that she is on a C.O.D. basis. Your Honor, from her own mouth she conceded she was on C.O.D. and C.B.D., and she also admitted that she had the difficulties prior to the issuance of our report of March, 1954.

One last point and I am through. I got up un-

prepared and I hope you will bear with me. No. I will leave it with you.

May I take this opportunity on behalf of Mr. Linsenmeyer and myself to thank the court for extending us the courtesy of appearing here, sir.

The Court: All right. This is not for the record.

Mr. Lindenbaum: No, this is not for the record.

The Court: Off the record.

(Discussion off the record.)

The Court: We will go back on the record in this particular case.

The record is going to be marked that the case is under submission, because I am not going to make any immediate decision. I am going to do something I have never done before, but I have to keep my work up, with the press of work, and as I say, it is going to be marked under submission and my ultimate decision is going to be given for the plaintiff, and I am going to ask Mr. Licht under the circumstances, inasmuch as this court is so busy, to prepare a brief to me in about ten days, for you to prepare a brief on which you [268] think the damages should be.

I am not going to allow any punitive damages. I have already stated that.

I mean I thought maybe that you would review the testimony and what you feel as to what the damages should be, not a lengthy brief, but you are so familiar with it, and then I would let Mr. Catlin, and of course Mr. Lindenbaum being from New York, have ten days to reply, and if you want a little more time to reply, Mr. Catlin, on that, be-

cause you might want to correspond with Mr. Lindenbaum.

Mr. Catlin: I would appreciate a little more time than that.

The Court: I just said ten because I figured that Mr. Licht is right here in Beverly Hills, and you will probably have the laboring oar. You won't be consulting with your Phoenix counsel, will you?

Mr. Licht: No, your Honor.

The Court: And shall we give them, say, 30 days, because of the fact your situation is a little different. In other words, Mr. Lindenbaum will be in New York and Mr. Catlin in his answer might want to send it to Mr. Lindenbaum, back and forth, before he files it in court. So it will be just on that question of damages. Then the court will ultimately enter its order for the plaintiff. It will be on what he feels the damages to be. I am not certain on it now. [269]

There will be no punitive. You both understand that.

Mr. Licht: Yes, I understand that.

The Court: But for the record, the case will stand submitted at this time.

Mr. Licht: Thank you.

The Court: In writing this memorandum you can write it with the thought of the way the court has expressed its opinion.

Mr. Licht: Thank you very much. [270]

[Endorsed]: Filed July 24, 1957.

[Endorsed]: No. 15778. United States Court of Appeals for the Ninth Circuit. Lyon Furniture Mercantile Agency, Appellant, vs. Irene M. Carrier, doing business as Wishmaker House, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: October 26, 1957.

Docketed: November 5, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For The Ninth Circuit

No. 15778

LYON FURNITURE MERCANTILE AGENCY,
Appellant,

v.

IRENE M. CARRIER, dba Wishmaker House,
Appellee.

STATEMENT OF POINTS AND
DESIGNATION OF RECORD

Comes Now the Appellant and files herewith its Statement of Points and Designation of Record in accordance with Rule 17(6) of the Rules on Appeal.

Designation of Points On Appeal

1. Did the Court below err in not granting the appellant's timely motion requiring the appellee to file an undertaking as a condition precedent to the maintenance of this action for damages for libel?

2. Did the Court below err in not granting the appellant's motion for a dismissal at the conclusion of the appellee's evidence?

3. Did the Court below err in failing to find that the credit reports complained of and set forth in appellee's amended complaint were privileged as a matter of law and as provided by Section 47, Subdivision 3 of the Civil Code of the State of California, and likewise failing to find that they were factually and substantially true, and also failing to find that they were made without malice in that malice was not inferred, as is clearly set forth in Section 48 of the Civil Code of the State of California?

4. Did the Court below err in failing to find that the appellant is and was at all times a National Credit Agency engaged in the business of issuing credit reports in the furniture industry to members or subscribers of said Agency?

5. Did the Court below err as a matter of fact in failing to find that the appellee did not suffer any damages by reason of the issuance of the credit reports complained of based upon any testimony given at the trial?

6. Did the Court below err in failing to find that

as a matter of law the appellee could not recover any damages in the absence of a specific finding that the reports complained of in appellee's amended complaint were not privileged, or if privileged that they were actuated by malice?

7. Did the Court below err in failing to find on material allegations both in appellee's amended complaint and in appellant's answer in the following respects:

a. The Court below failed to find and there is no finding with respect to the allegations set forth in Paragraph IV of appellee's amended complaint.

b. The Court below failed to find and there is no finding with respect to the allegations set forth in Paragraph VI of appellee's amended complaint.

c. The Court below has failed to find and there is no finding with respect to the allegations set forth in Paragraph IX of the appellee's amended complaint.

d. The Court below has failed to find and there is no finding with respect to the allegations set forth in appellant's first and second affirmative defenses.

e. The Court below has failed to find and there is no finding with respect to the allegations that the communications complained of were privileged and were published without malice.

8. Did the Court below err in finding that the appellant was "grossly negligent in its conduct" as

found in Paragraph V of appellee's Findings of Fact on file herein?

Designation of Record

Amended Complaint for Libel.

Answer to Plaintiff's Amended Complaint.

Designation of Record on Appeal.

Findings of Fact and Conclusions of Law.

Judgment.

Minutes Orders of Court—8/23/55; 9/24/57.

Names and Addresses of Attorneys.

Notice of Appeal.

Notice of Hearing and Motion to Require Plaintiff to file an Undertaking, and Motion for More Definite Statement.

Notice of Motion and Motion for a New Trial and for an Order directing the entry of a Judgment for Defendant.

Points and Authorities in Support of Defendant's Motion for a New Trial and for an Order Directing the entry of a judgment for defendant and For an Order Amending the Findings of Fact and Conclusions of Law.

Stipulation re Amount of Cost Bond on Appeal and Supersedeas Bond and Order Thereon.

Substitution of Attorneys for Defendant.

Appellee's Exhibits 1 to 16, inclusive, and Appel-

lant's Exhibits A to I, inclusive, as designated in the "Certificate By Clerk" and two volumes of Reporter's Official Transcript of proceedings had on May 14, 15 and 16, 1957.

Dated: November 4, 1957.

CATLIN & CATLIN,
SAMUEL A. MILLER &
MEYER LINDENBAUM,

/s/ By SAMUEL A. MILLER,
Attorneys for Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Nov. 6, 1957. Paul P. O'Brien,
Clerk.



No. 15785 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LUIS L. CERVANTES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

LAUGHLIN E. WATERS,
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FILED

SEP - 6 1958

PAUL P. O'BRIEN, CLERK

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No. 15785

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LUIS L. CERVANTES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.

Jurisdictional Statement.

The jurisdiction of the District Court is founded upon Section 3231, Title 18, United States Code. The jurisdiction of the Court of Appeals to entertain this matter may be found under the provisions of Section 1291, Title 28, United States Code, and Rules 37 and 39 of the Federal Rules of Criminal Procedure.

II.

Statement of the Case.

Appellant was convicted after trial by jury in the Southern District of California on February 23, 1956 on three counts of illegally importing, transporting, and concealing narcotics; to-wit, heroin and marihuana, in viola-

tion of Section 174, Title 21, United States Code, and Section 545, Title 18, United States Code. During the trial Appellant's Motion to Suppress Evidence was denied after testimony had been taken out of the presence of the jury. On March 16, 1956, Cervantes was committed to the custody of the Attorney General for a period of eight years on each of counts one and two and for a period of five years on count three. All sentences were ordered to run concurrently. A fine of \$100 was imposed on each of the three counts.

Notice of Appeal was received by the Court on March 22, 1956 and lodged by the Clerk, March 23, 1956. On May 10, 1956, the District Court certified that the Appeal was not taken in good faith and denied Appellant permission to prosecute the Appeal *in forma pauperis*. On September 24, 1956, this Honorable Court ordered the Appeal dismissed and a mandate was forwarded to the District Court, which mandate was spread on October 29, 1956. Thereafter, this Honorable Court reinstated the Appeal, and directed that an attorney be appointed for Appellant and that he be permitted to proceed *in forma pauperis*.

III.

Specification of Error.

Appellant urges only one point in the Appeal now pending before this Honorable Court: “* * * whether the Customs and Immigration officers who detained and searched Mr. Cervantes had reasonable grounds to believe him to be carrying contraband of committing a felony.”

IV.

Statement of the Facts.

References designated "P. Tr." refer to the partial transcript docketed on November 14, 1957, and the references to "Rep. Tr." refer to the Reporter's Transcript for Appeal. Clifford J. Davis is a Patrol Inspector employed by the Immigration & Naturalization Service at Oceanside, California. He is also an authorized Customs Inspector [Rep. Tr. p. 10]. On December 8, 1955, Davis was working out of Oceanside and stopped the defendant while the latter was driving north on Highway 101 near San Clemente [Rep. Tr. pp. 11, 13]. After stopping the car a search of the driver yielded Government's Exhibit 1 [Rep. Tr. pp. 14, 15]. The contents of this exhibit were subsequently analyzed and found to be heroin [Rep. Tr. p. 65]. This search of the driver also produced Government's Exhibit 2, a hypodermic syringe [Rep. Tr. pp. 15, 16]. Thereafter the defendant, his lady passenger, and the automobile were transported to San Clemente [Rep. Tr. p. 55]. At San Clemente a further search of the vehicle was conducted and this search revealed a number of marihuana seeds [Govt. Ex. 3; Rep. Tr. pp. 56, 57] and a "secret" compartment [Rep. Tr. pp. 56, 57]. The defendant's automobile had been stopped as a result of a "lookout" posted by Mr. Grant of the Customs Service [P. Tr. pp. 13, 20], which directed that a Chrysler automobile with a given license number containing two passengers, a man and woman, should be stopped and the occupants and the vehicle searched [P. Tr. p. 27]. Mr. Grant testified that the basis for his directing that the described vehicle and its occupants be stopped and searched was as follows: On September 27, 1955 [P. Tr. pp. 6,

11], he received information from a source described as one who "has informed" [P. Tr. p. 23] that a man of Mexican extraction [P. Tr. p. 17] by the name of "Luis", last name unknown [P. Tr. pp. 11, 20], had come to Tijuana from Los Angeles to purchase narcotics [P. Tr. p. 17]. The information was that "Luis" was dealing with one Manuel Vargas [P. Tr. pp. 11, 24]—a person known to Mr. Grant since 1946 as a vendor of narcotics in Tijuana [P. Tr. p. 12]. The informant further advised that the car driven by "Luis" contained a secret compartment for hiding marihuana [P. Tr. pp. 17, 19, 20, 24]. The description of the car was not positive [P. Tr. pp. 17, 20], being described as a green Plymouth or Dodge. Mr. Grant was supplied with two possible license numbers [P. Tr. pp. 11, 16, 20]. A lookout for this car was placed at the border by Mr. Grant; however, without success [P. Tr. p. 11]. Mr. Grant thereafter ran a license check for the first number and letter of the license number given but found no Dodge or Plymouth registered to a "Luis" [P. Tr. pp. 11, 17, 17a].

On October 25, 1955, Mr. Grant was again contacted by the same informant [P. Tr. p. 23], and advised that the car concerning which the previous information had been supplied was again in Tijuana [P. Tr. p. 23]. At this time the informant gave a corrected license number [P. Tr. pp. 21, 22, 23]. Mr. Grant went to Tijuana and observed the defendant in the described auto [P. Tr. pp. 12, 17a, 22]. A lookout was again placed at the border [P. Tr. p. 12]; however, it was apparently unsuccessful.

The corrected license number was checked by Mr. Grant and it was discovered that the automobile was registered to Luis Cervantes in Los Angeles [P. Tr. pp. 13, 17a, 22]. A check of the San Diego Police Department records revealed that in 1941 Luis Cervantes had been convicted in Federal Court for smuggling marihuana [P. Tr. pp. 16 and 18] and had a number of other arrests for narcotics [P. Tr. pp. 7, 13 and 18].

On December 8, 1955, Mr. Grant again observed the defendant and the automobile in Tijuana [P. Tr. pp. 17a, 18 and 19]. At this time Grant again placed a lookout at the border and requested that Oceanside be advised by radio [P. Tr. pp. 12, 20]. Mr. Grant has been employed by the Customs Service for 25 years, during 16 of which he has been assigned to San Diego [P. Tr. p. 25]. Grant considered Tijuana the main source of supply for narcotics in California and in the cases he had investigated 75 per cent of the contraband was going outside of San Diego and most of this to Los Angeles [P. Tr. p. 27]. Highway 101, where Inspector Davis stopped the defendant [Rep. Tr. p. 13] is one of the two main arteries leading north out of the San Diego area [P. Tr. pp. 5, 28].

V.

ARGUMENT.

A. The Constitution of the United States Prohibits Only Searches and Seizures Which Are Unreasonable.

The Fourth Amendment to the Constitution provides in effect that all persons shall be secure not only in their persons but in their property and effects, and shall be free from searches and seizures which are unreasonable. It is important to note that not all searches are prohibited by this Amendment, but only those which are "unreasonable". (*Carroll v. United States*, 267 U. S. 132, 147 (1925).) Stated another way, this Amendment protects persons against officers acting on "whim, caprice or mere suspicion". (*Brinegar v. United States*, 338 U. S. 160, 177 (1949).) The test by which the actions of officers in making a search must be examined has been often stated. The rule is that before officers may conduct a search there must be probable cause for such action.

"Probable cause exists where 'the facts and circumstances within their (the officers) knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief' that an offense has been or is being committed. *Carroll v. United States*, 167 U. S. 132, 162."

Brinegar v. United States, *supra*, pp. 175, 176;

Hamer v. United States, F. 2d (9th Cir., 1958), p. 13, Slip opinion; decided Aug. 26, 1958;

Lowery v. United States, 135 F. 2d 626 (9th Cir., 1943);

Cannon, et al. v. United States, 158 F. 2d 952, 954 (5th Cir., 1946) Cert. den. 330 U. S. 839, Rehearing denied 331 U. S. 863;

United States v. Walker, 246 F. 2d 519, 526 (7th Cir., 1957);

Gillam v. United States, 189 F. 2d 321 (6th Cir., 1951).

B. Under the Facts of This Case as Adduced During the Hearing on the Motion to Suppress, It Cannot Be Said That the Trial Judge Erred in His Conclusion That the Officers Had Probable Cause for Their Actions.

An examination of the rule quoted before indicates that the question of whether or not probable cause exists is essentially a factual inquiry, and no fixed formula can be arrived at.

United States v. Rabinowitz, 339 U. S. 56, 63 (1950);

Rocchia v. United States, 78 F. 2d 966, 969 (9th Cir., 1935).

Although as noted each case must be decided on its own particular facts, this Honorable Court's attention is respectfully invited to the following authorities, wherein a finding of probable cause was held appropriate:

Brinegar v. United States, *supra*;

Carroll, et al. v. United States, *supra*;

White v. United States, 16 F. 2d 870 (9th Cir., 1926);

Leong Chong Wing v. United States, 95 F. 2d 903 (9th Cir., 1938);

United States v. Li Fat Tong, 152 F. 2d 650 (2nd Cir., 1945);

United States v. Walker, supra;
Scheer v. United States, 305 U. S. 251 (1938);
Draper v. United States, 248 F. 2d 295 (10th Cir.,
1957).

Appellee is not unmindful of the decision of the Supreme Court of the United States in *United States v. Di Re*, 332 U. S. 581 (1948). It is submitted that to an extent the *Di Re* case may be explained by the failure of the officers to obtain a warrant (*United States v. Walker, supra*, p. 525). In the case presently pending before this Honorable Court there is specific statutory authority for the action taken by the officers in the absence of a warrant (19 U. S. C. 482; see *Carroll v. United States, supra*, pp. 151, 152). In any event Appellant concedes that there is no absolute requirement that Customs Officers must obtain a warrant (Appellant's Op. Br. p. 8; see *United States v. Rabinowitz, supra*, pp. 65 to 66).

The majority opinion in the *Di Re* case, however, went on to observe that even if a search of the vehicle on the basis of probable cause could have been justified such authority would not extend to the right to search the occupant *Di Re* (*United States v. Di Re, supra*, pp. 584, 587). It should be noted that in the *Di Re* case the officers had absolutely no information whatsoever about *Di Re* until they had approached the automobile and been advised by an informant that the driver, who was not *Di Re*, had supplied counterfeit coupons. In the case now pending, although the information was relayed to the Customs Service with reference to a particular vehicle the information essentially concerned the activities of the man controlling the auto. On December 8, 1955, when Agent Grant of the Customs Service observed Appellant in Tijuana, Mexico, Mr. Grant had knowledge of the follow-

ing facts: On September 27, 1955, he had received information from a source described as "having informed" that a "Luis" from Los Angeles was in Tijuana in an automobile with a secret compartment and was negotiating with a dealer in narcotics who had been known to Mr. Grant since 1946. On October 28, 1955, the same source advised Mr. Grant that the car was again in Tijuana and corrected the license number and description of the car. On this date the accuracy of the information was to a degree verified by Mr. Grant's personal observation (*Cf. United States v. Walker, supra*), Grant thereafter, checked the motor vehicle registration and found that the auto belonged to a Luis Cervantes from Los Angeles. By December 8, the day on which the search took place, Grant had also ascertained that Luis Cervantes had been convicted for smuggling marihuana and had a number of arrests for narcotics. Certainly, it cannot be said that at this point Grant was acting on a completely uninvestigated tip of an informer (compare: *United States v. Castle*, 138 Fed. Supp. 436, relied on by Appellant). Furthermore, the place that Mr. Grant observed Appellant on December 8 (Tijuana), is not without significance. It is submitted that the geographical relationship between San Clemente, the place of the search, and Tijuana [*Cf. Rep. Tr. p. 60*] and the fact that Tijuana is a well known source for illicit drugs are matters of which this Court might properly take judicial notice (*Carroll v. United States, supra*, p. 160), We have in the instant case, however, the direct testimony of Mr. Grant (*Brinegar v. United States, supra*, p. 167; *Gillam v. United States, supra*) that he had been employed by the Customs Service for 26 years, that part of his duties concerned detection of narcotic violators and that he had been assigned to the San Diego area for sixteen years.

He knew Tijuana as a main source of supply for illicit drugs and in the cases he investigated 75 per cent left the San Diego area. Grant knew the defendant was from Los Angeles, and Highway 101 was one of the main arteries leading north. Certainly, with all of these factors in mind it cannot be validly argued that Mr. Grant's directive to stop the defendant if he was discovered going north on Highway 101 toward Los Angeles was an act of caprice or whim.

Assuming that Mr. Grant reasonably concluded that the defendant was transporting narcotics from Tijuana to Los Angeles it should be noted that such a conclusion indicated a serious felony (21 U. S. C. Secs. 174 and 176(a)). There was nothing to indicate that a misdemeanor only was involved (compare *Clay v. United States*, 239 F. 2d 196 (5th Cir., 1956) relied on by Appellant, and *United States v. Di Re*, *supra*, p. 592).

In summary, it is respectfully submitted that a reasonably prudent man with the knowledge, experience, and information possessed by Mr. Grant would have been prompted to a conclusion that the defendant was engaged in transporting narcotics from Tijuana, Mexico to Los Angeles, California; hence, it cannot be said that the trial judge erred in denying Appellant's Motion to Suppress and concluding that Agent Grant's actions were justified.

See:

Lowery v. United States, *supra*;

King v. United States, 1 F. 2d 931 (9th Cir., 1924);

Medina v. United States, 158 F. 2d 955 (5th Cir., 1946).

Conclusion.

For the foregoing reasons it is respectfully submitted that the judgment of conviction in the District Court should be affirmed.

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No. 15786 /

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DONALD ROBERT MATHES,

Defendant-Appellant,

vs.

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

APPELLEE'S BRIEF.

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No. 15786

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DONALD ROBERT MATHES,

Defendant-Appellant,

vs.

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

APPELLEE'S BRIEF.

I.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Southern District of California denying the Motion of Appellant to Modify and Vacate a Sentence in Case No. 25442-CD of said court.

The jurisdiction of the district court is founded upon Section 3231, Title 18, U. S. C. The petition to vacate the original judgment was made by appellant pursuant to Section 2255, Title 28, U. S. C. The jurisdiction of the Court of Appeals to entertain this matter may be found under the provisions of Section 1291, Title 28, U. S. C. and under Rules 37 and 39 of Federal Rules of Criminal Procedure.

II.

STATEMENT OF FACTS.

Appellant was indicted at Los Angeles, California, on November 21, 1956 with others in a five-count indictment alleging violations of Title 21, Section 174, U. S. C., sales of heroin and conspiracy to sell heroin. Appellant was named in substantive counts one and four and in the conspiracy count five. He was arraigned on January 28, 1957. The Court appointed Andrew J. Davis, Esq., as his Counsel. Appellant pleaded not guilty at that time. On February 12, 1957, at the time set for trial, appellant asked for permission to withdraw his previous plea as to counts one and five for purposes of entering different pleas. The motion was granted and appellant then pleaded guilty to counts one and five. He was not tried. Two of his co-defendants were tried and found guilty on all counts in which they were charged. The fourth co-defendant plead guilty under Rule 20 in the Federal District Court for the Northern District of California.

The act alleged in count one of the Indictment occurred on September 12, 1956. The overt acts alleged in count five commenced September 12, 1956 and continued to October 23, 1956.

The sentence as to appellant Mathes was set for 11:00 A.M. on March 4, 1957 before the Honorable Thurmond Clarke, United States District Judge. At 10:55 A.M. on that date, in the absence of Counsel for the Government and for appellant, the court purported to sentence appellant to two years imprisonment, to suspend execution of said

sentence, and to place appellant on probation for a period of two years. Defendant was thereupon permitted to leave. At 11:00 A.M., government counsel, Assistant United States Attorney Louis Lee Abbott, appeared, and upon learning of the court's improper action (in that Section 174 then and now precludes suspension of the execution of sentence and precludes the granting of probation), made a motion to vacate the illegal sentence and for issuance of a bench warrant to return appellant to court for legal sentence. The court did vacate the sentence and continued the matter until 2:00 P.M. of the same day. At that time appellant was present in person and was represented by counsel. The court thereupon sentenced him to five years imprisonment on each of counts one and five, the sentences to run concurrently. The Government then moved to dismiss count four, which motion was granted by the court.

No appeal was taken from the sentence.

On September 24, 1957, appellant filed a motion with the trial court to vacate and set aside the sentence of March 4, 1957, which motion was denied by the court without hearing. (The foregoing does not appear in the Clerk's Transcript of Record as filed in this matter. Appellee is asking that the record be augmented to include this necessary material to properly qualify appellant's appeal.) Appeal was made from such denial, the court also having granted permission to appellant to proceed *in forma pauperis*.

III. ARGUMENT.

A.

General Considerations.

Appellee does not accept the statement that appellant's change of plea from not guilty to guilty was made "in agreement with the Government counsel" (Appellant's Br. p. 1). The Government did indicate that it would not go to trial on count four against appellant in the event that he did plead guilty to the other two counts, which agreement was honored [R. T. p. 16].

Appellee does not accept the inference, from appellant's statement, regarding his "agreement with the court," the inference being that his plea was improperly induced. In this regard it should be noted that on the day of sentence appellant was given the opportunity to withdraw his plea of guilty and to stand trial. He elected to stand on his plea. (Appellant's Br. p. 2.)

Appellant clearly admits that he does not attack the validity of his conviction. (Appellant's Br. p. 2.) He was given the absolute minimum sentence provided by law, and the appeal is absolutely groundless. The only authority cited by appellant is not a federal case. He refers to a state case from Ohio which is one-hundred years old. His argument, in effect, is: "I committed the crime, but the Judge erred in my sentence, hence I do not have to serve the time required for the offense by act of Congress."

Furthermore, appellant, not having appealed the sentence he now complains of, is precluded from raising the point at this time since Title 28, U. S. C., Section 2255 is not to be used as a substitute for appeal.

United States v. Walker, 197 F. 2d 287, 288 (2 Cir., 1952), cert. den. 344 U. S. 877;

Taylor v. United States, 177 Fed. 194, 195 (4 Cir., 1949);

Davilman v. United States, 180 F. 2d 284, 286 (6 Cir., 1950).

B.

Error May Not Be Predicated Upon an Invalid Sentence.

Appellant's contention in the instant case has no precedent. In fact, all the authority concerning the issue involved herein is directly *contra* to the position taken by him.

The imposition of a sentence which is at variance with statutory requirements is considered a void act.

United States v. Bogza, 155 F. 2d 592 (3 Cir., 1946), affirmed 330 U. S. 160;

Anderson v. Rives, 85 F. ~~2d~~ 673 (App. D. C., 1936);

Hammers v. United States, 279 F. ~~2d~~^{ed} 265, 266 (5 Cir., 1922).

In the instant case, the trial court imposed an invalid sentence of two years after appellant's conviction under Title 21, U. S. C., Section 174. Such a sentence is a nullity under this statute. It is provided therein that one convicted of the prescribed offense:

“ . . . shall be imprisoned *not less than five* or more than twenty years. . . .” (Emphasis added.)

When such a void sentence is imposed by the trial court, it may be corrected at any time. In passing upon this point the court in *United States v. Bozza, supra*, at 595, affirming the conviction and sentence, said:

“ . . . such a sentence may be superseded by a new sentence in conformity to the provisions of the statute. It is no hinderance that the correction—even when it entails a greater punishment—occurs after sentence has been partially served or after the term of court has expired. . . . ”

Therefore, even assuming *arguendo* that appellant's detention from 11:00 A.M. on March 4, 1957, when counsel for the United States moved to vacate the void sentences to 2:00 P.M. of the same day when appellant was properly sentenced, was partial service of the original sentence, it does not preclude an increase in punishment because the original sentence had no legal force or effect. It is only when service of a *valid* sentence has begun that the court loses its power to increase the punishment. *Wilson v. Buck*, 137 F. 2d 716, 721 (6 Cir., 1943). Nor is this principle archaic. In *Pollard v. United States*, 352 U. S. 354 (1956) the Supreme Court, in citing *United States v. Bozza, supra*, said, at page ~~361~~: 361

“It is not disputed that a court has power to enter sentence at a succeeding term where a void sentence had been previously imposed.” (Emphasis added.)

It cannot, however, even be assumed that appellant had begun to serve his sentence. In *Oxman v. United States*, 148 F. 2d 750 (8 Cir., 1945), cert. den. 325 U. S. 887, rehearing denied 326 U. S. 804, the appellant was removed to the Marshal's office for a few hours after he had been sentenced. The Judge subsequently discovered that he had sentenced appellant to a lesser term

than he had intended. The Judge then corrected the sentence which was apparently *valid* as it was originally pronounced. The court held that the appellant's punishment could be increased because he had not begun the service of the sentence while he was in the Marshal's office.

Therefore, from the foregoing authorities, it is clear that the appellant in the instant case cannot sustain his contentions.

C.

The Resentencing of Appellant After the Initial Void Sentence Had Been Imposed Did Not Put Him in Double Jeopardy.

Because the sentence imposed in the instant case was a void act (*United States v. Bozza*, 155 F. 2d 592, 595 (3 Cir., 1946)), it follows that the resentencing which occurred three hours later did not subject the appellant to double jeopardy. The court merely substituted a sentence required by statute for one which the court had no authority to impose. In considering the same question involved herein, the Supreme Court said in *Bozza v. United States*, 330 U. S. 160, 166-167:

“ . . . the fact that petitioner has been twice before the Judge for sentencing and in a federal place of detention during the five hour interim cannot be said to constitute double jeopardy as we have heretofore considered it . . . the sentence, as corrected, imposes a valid punishment for an offense instead of an invalid punishment for that offense.”

The instant case is on all fours with the *Bozza* case. Appellant cannot, therefore, claim that the valid sentence he received put him in jeopardy a second time.

IV.
CONCLUSION.

(1) The trial court's initial sentence was not provided for by statute; therefore, it was a void act.

(2) There is undisputed authority for the proposition that a void sentence may be corrected at almost any time thereafter.

(3) Appellant's detention of three hours after the initial void sentence and before the resentencing was not partial service of the original sentence, even if such original sentence is assumed to be valid.

(4) Since the initial sentence in the instant case was void, the subsequent valid sentence imposed by the trial court did not place appellant in double jeopardy.

Therefore, the Government respectfully requests that the order and judgment of the trial court denying defendant's motion under Section 2255, Title 28, U. S. C., be affirmed.

Respectfully submitted,

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No. 15,793

IN THE
United States Court of Appeals
For the Ninth Circuit

GERMAINE M. HAILI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

**On Appeal from the United States District Court
for the District of Hawaii.**

BRIEF FOR APPELLEE.

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No. 15,793

IN THE

**United States Court of Appeals
For the Ninth Circuit**

GERMAINE M. HAILI,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

**On Appeal from the United States District Court
for the District of Hawaii.**

BRIEF FOR APPELLEE.

JURISDICTION.

The District Court had jurisdiction of the trial of this case under 18 U.S.C. § 3232, and Rule 18, Federal Rules of Criminal Procedure. After conviction on Count II of two counts of the Indictment a timely appeal *in forma pauperis* was taken by the Defendant and the jurisdiction of this Court to review the Judgment of the District Court is invoked under 28 U.S.C. §§ 1291 and 1294.

STATEMENT OF THE CASE.

Appellee agrees with Appellant's statement of the case as supplemented by the following:

(1) After indictment on May 13, 1957, a Motion for Bill of Particulars was filed by the Defendant on May 4, 1957. (R. 5.) A hearing was had on the Motion on June 6, 1957, and certain oral particulars were given, accepted by the Defendant, and made a part of the record (R. 7-9), to the effect that Count II of the Indictment was based upon the conditions of probation shown by the Court's judgment and orders therein and the testimony at the hearing on the revocation of probation of Harriet Bruce in Criminal No. 11,073 in the United States District Court for the District of Hawaii, and the acts complained of were those testified to by the Defendant and others at this hearing.

(2) Appellant at Page 4 of his Brief makes the following statement:

“Based on the fact that appellant associated with the probationer when the probationer was directed not to do so, appellant was indicted for obstructing and impeding the due administration of justice.”

It should be pointed out here that the particulars given and the proof at the trial showed that this so-called association of the Defendant with the Probationer involved the situation where Defendant was advised and so acknowledged that the Probationer was not to associate with him, but that in spite of that knowledge he: (1) continually forced his unwanted presence on the Probationer even to the extent of breaking into her apartment; (2) attempted to deceive her into believing that the Probation Officer was a friend of his

and that his association with her therefore would be condoned by the Probation Officer; and (3) threatened her repeatedly and beat her physically in order to convince her of the foregoing and to intimidate her sufficiently so that she would not report his associations with her to the Probation Officer.

The foregoing are uncontroverted facts made as judicial admissions by the Defendant (Plaintiff's Exhibit "1", R. 132-186.)

QUESTIONS PRESENTED.

This appeal presents two basic questions:

(1) Whether Count II of the Indictment taken together with the particulars thereto sufficiently alleges an offense under 18 U.S.C. § 1503.

(2) Whether Count II of the Indictment, supplemented by the particulars and borne out by the evidence, states and demonstrates an offense under 18 U.S.C. § 1503.

ARGUMENT.

I.

COUNT II OF THE INDICTMENT TAKEN TOGETHER WITH THE PARTICULARS THERETO SUFFICIENTLY ALLEGES AN OFFENSE UNDER 18 USC § 1503.

Count II of the Indictment reads as follows:

“The Grand Jury Further Charges:

“That commencing on or about October 10, 1956, up to and including March 8, 1957, in the City

and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, Germaine M. Haili, the identical person named in Count I of this Indictment, did corruptly, and by threats and force, influence, obstruct and impede, and endeavor to influence, obstruct and impede the due administration of justice with respect to the terms and conditions of probation of one Harriet Elizabeth Bruce, also known as Honey Harlow, defendant in Criminal No. 11,073, United States District Court for the District of Hawaii, in violation of Section 1503, Title 18, United States Code.” (R. 3.)

Appellant contends that the foregoing Count of the Indictment is fatally defective in that it fails to allege that Defendant had knowledge that justice was being administered, in other words, the element of *scienter*. In this respect Appellant relies primarily on *Pettibone v. U.S.*, 148 U.S. 197. It is felt that the *Pettibone* case is not a true test to be applied to an indictment under the present day rules of criminal pleading. The rigid requirements set forth in *Pettibone* with regard to pleading under this statute and in particular the requirement set forth that the indictment allege that the defendant must have known that “the particular justice was there being administered” have been distinguished many times since. See *Anderson v. U.S.*, 6 Cir. 1954, 215 F. (2d) 84; *Sparks v. U.S.*, 6 Cir. 1937, 90 F. (2d) 61; *Hone Wu v. U.S.*, 7 Cir. 1932, 60 F. (2d) 189; *Chiaravaoti v. U.S.*, 6 Cir. 1932, 60 F. (2d) 192.

The present day rule applicable to criminal pleading in the Federal Courts is set forth by Justice Sutherland in *Hagner v. U.S.*, 285 U.S. 427, at page 431:

“The rigor of old common law rules of criminal pleading has yielded, in modern practice, to the general principle that formal defects, not prejudicial, will be disregarded. The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, ‘and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.’ (Cit.)”

The decided cases wherein indictments under the Obstruction of Justice statute have been attacked, almost universally exclude the requirement that specific elements of *scienter* be set out in the indictment. For example, it is held that where the charge is interference with a witness the indictment need not charge that the defendant knew that the person interfered with was to be a witness. *Seawright v. U.S.*, 6 Cir. 1955, 224 F. (2d) 482; *Parsons v. U.S.*, 5 Cir. 1951, 189 F. (2d) 252; *Contra Genna v. U.S.*, 7 Cir. 1923, 293 Fed. 387, cited by Appellant. It has also been held that under an indictment charging the impeding of officers of the Court under this statute the indictment need not set forth who were the officers to be impeded, *U.S. v.*

Polakoff, 2 Cir. 1949, 112 F. (2d) 888, or that the person impeded was a Deputy Marshal, *Sparks v. U.S.*, *supra*, nor that the defendant knew he was such officer, *State v. Caldwell*, 14 Mass. 330. In an indictment charging obstruction of justice by destroying certain documents, it has been held that the indictment need not allege that the documents destroyed were involved in the due administration of justice, *U.S. v. Solow*, D.C. S.D.N.Y. 1956, 138 F. Supp. 812, or were material, *U.S. v. Siegel*, S.D.N.Y. 1957, 152 F. Supp. 370; and in an indictment charging obstruction of justice by filing certain false letters and affidavits, it has been held that the indictment need not allege that the letters and affidavits were false to the knowledge of the defendant, *Nye v. U.S.*, 4 Cir. 1943, 137 F. (2d) 73.

So, too, it is unnecessary to allege the jurisdiction of the Court in which justice was being obstructed, *Nye v. U.S.*, *supra*; *Davey v. U.S.*, 7 Cir. 1913, 208 Fed. 237.

But most significantly it has been held unnecessary to allege knowledge of the defendant that there was a pending proceeding in Court, *Anderson v. U.S.*, 6 Cir. 1954, 215 F. (2d) 84; *Astwood v. U.S.*, 8 Cir. 1924, 1 F. (2d) 639; nor that the defendant knew that justice was being administered, *U.S. v. Solow*, *supra*, nor that the defendant had the intent thereby to impede justice; *Holland v. U.S.*, 5 Cir. 1957, 245 F. (2d) 341; *Astwood v. U.S.*, *supra*. As was said in *Caldwell v. U.S.*, D.C. Cir. 1954, 218 F. (2d) 370, at page 372:

“ . . . The only intent involved in the crime is the intent to do the forbidden act. The defendant

‘must have had knowledge of the facts, though not necessarily the law, that made’ his act criminal. *Morissette v. U.S.*, 342 U.S. 246 . . . ”

See also *Astwood v. U.S.*, *supra*, 1 F. (2d) at page 642. In the *Caldwell* case the Court of Appeals also approved the following charge to the jury, stating at page 371:

“The court charged the jury ‘as a matter of law, that if any person endeavors to ascertain the feelings or opinions of jurors while they are sitting in a case and prior to their verdict, that is a corrupt endeavor to obstruct or impede the due administration of justice.’ ”

See also *U.S. v. Russell*, 255 U.S. 138.

As previously mentioned, an indictment under the present rules of criminal pleading and specifically an indictment under 18 U.S.C. § 1503 need only fairly apprise the defendant of the crime intended to be alleged so as to enable him to prepare his defense and to make the judgment a complete defense to a second prosecution for the same offense. *Anderson v. U.S.*, *supra*. It has been held that an indictment under the present 18 U.S.C. § 1503 which is couched in the general language of the statute is satisfactory and that if defendant does not feel sufficiently informed he should move for a bill of particulars. *Morris v. U.S.*, 5 Cir. 1952, 128 F. (2d) 912; *U.S. v. Polakoff*, *supra*; *Nye v. U.S.*, *supra*. In this latter case, the Court held that an Indictment charging the defendant with corruptly obstructing the administration of justice by endeavoring to have a pending action dismissed by filing

false letters and affidavits which had been fraudulently obtained, stated an offense under the statute. In answer to defendant's contentions otherwise the Court pointed out that some of the details of the offense were provided in another conspiracy count and that if the defendant felt in need of additional information in preparing his defense his remedy was a motion for a bill of particulars. Moreover the record showed that when the defendant made such a motion he was advised by the representatives of the Government that the letters and affidavits relied on were those described in the first count, and as a result, the bill of particulars was not necessary.

At the hearing on the Motion for Bill of Particulars herein, it was represented to the Court and made a part of the record and accepted by the Defendant (R. 7-9) that Count II of the Indictment was based upon the conditions of probation shown by the Court's Judgment and orders therein and the testimony at the hearing on the revocation of probation of Harriet Bruce, in Criminal No. 11,073 in the United States District Court for the District of Hawaii, and that the acts were those testified to by the Defendant and others at this hearing. (It should be noted at this point that all of the evidence which was presented with respect to Count II was specifically within the particulars stated, that is, the Court's record in the case of Harriet Bruce and the revocation of probation therein, together with the testimony of the Defendant at the revocation hearing and the testimony of one other witness there, Betty McGuire.)

So, the real question is whether or not Count II of the Indictment taken together with all of the particulars specified by the Government, which in effect summarized all the evidence which was ultimately presented with respect to Count II, charges a substantive offense under 18 U.S.C. § 1503 as will be hereinafter discussed.

It should also be pointed out that the sufficiency of Count II of the Indictment was never challenged by pre-trial motion. It has been held that this constitutes a waiver. *U.S. v. Miller*, 2 Cir. 1957, 246 F. (2d) 486, 488.

“ . . . Upon a proceeding after verdict at least, no prejudice being shown, it is enough that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment.”

Hagner v. U.S., 285 U.S. 427, 433.

II.

COUNT II OF THE INDICTMENT, SUPPLEMENTED BY THE PARTICULARS AND BORNE OUT BY THE EVIDENCE, STATES AND DEMONSTRATES AN OFFENSE UNDER 18 USC §1503.

Section 1503 of Title 18 U.S.C. provides in part that:

“Whoever . . . corruptly or by threats or force . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice shall be fined not more than \$5,000 or imprisoned not more than five years, or both.”

The following extracts from various cases indicate the breadth of the meaning of the term "administration of justice" and the obstruction thereof as interpreted by the Courts:

"The term 'administration of justice' is a broad and comprehensive term. It means something more than the mere trial of a cause. It includes everything connected with the determination of the rights of person and property, every agency provided by law for the accomplishment of that purpose, and every step in the proceedings and process by which such determinations are embodied in a final determination therein, according to the established law of the land."

State v. Post, 16 Oh.S.&C.P. 200, 206, 4 Oh.N.P. 157;

1 C.J. 1239 n. 73.

"... the administration of *justice* means the 'performance of acts or duties required by the *law* in discharge of their duty.' *Belo v. Lacy* (Tex. Civ. App.) 111 S.W. 215."

Rosner v. U.S., 2 Cir. 1926, 10 F. (2d) 675, 676.

"... The statute is broad enough to cover any act, committed corruptly, in an endeavor to impede or obstruct the due administration of justice ..."

Samples v. U.S., 5 Cir. 1941, 121 F. (2d) 263, 266.

"The obstruction of justice statute is an outgrowth of Congressional recognition of the variety of corrupt methods by which the proper admin-

istration of justice may be impeded or thwarted, a variety limited only by the imagination of the criminally inclined. The concept of 'justice' . . . merely recognizes the inherent right of society to protect itself and its innocent members from vicious acts which imperil one of the most vital safeguards of our system of law . . . ”

Catrino v. U.S., 9 Cir. 1949, 176 F. (2d) 884, 887.

There is no question but that probation constitutes one phase of the administration of justice since it is well established that it is a discretionary power vested in trial courts to be exercised upon considerations of the best interests of the public. *Kirsch v. U.S.*, 173 F. (2d) 652; *U.S. v. Durkin*, 63 F. Supp. 570. In *Roberts v. U.S.*, 320 U.S. 264, it is pointed out at Page 272 that:

“ . . . the basic purpose of probation [is] to provide an individualized program offering a young or unhardened offender an opportunity to rehabilitate himself without institutional confinement under the tutelage of a probation official and under the continuing power of the court to impose institutional punishment for his original offense in the event that he abuse this opportunity. To accomplish this basic purpose Congress vested wide discretion in the courts . . . ”

Thus, although probation is a type of punishment primarily to discipline and rehabilitate the defendant, it is also based upon considerations of the public good.

The probation statute (18 U.S.C. § 3651) provides that before probation may be granted, the court must

be satisfied that the ends of justice and the best interests of the public, as well as the defendant, will be served thereby. Since the offender is under the continuing control and surveillance of the court, any act deliberately done to cause the probationer to violate the terms of the probation must necessarily be a violation of the Obstruction of Justice statute (18 U.S.C. § 1503).

In *Ryals v. U.S.*, 5 Cir. 1934, 69 F. (2d) 946, 947, the Court, in considering whether or not an assault on a Probation Officer was a contempt of court as an obstruction of justice, stated as follows:

“ . . . The probation officer is appointed by the court to serve the court and has duties fixed by law . . . He is a ministerial officer of the court, and the court has power to protect him while executing its orders and commands, whether oral or written . . . obstruction of him must be with knowledge of his official character and mission and must be willful and intentional to be a contempt of court . . . ”

There are numerous cases charging offenses under the omnibus clause of the statute set forth above and as used in Count II of the Indictment herein.

An indictment charging that the defendants did corruptly endeavor to impede the due administration of justice, in that they promised a named person in consideration of a payment of money that they would alter the testimony of one defendant and of another person in a pending criminal prosecution in Federal Court stated a criminal offense under 18 U.S.C. § 1503.

Anderson v. U.S., supra. An indictment charging the defendant with corruptly endeavoring to obstruct the due administration of justice by endeavoring to influence another to obtain information from petit jurors in a specific case before return of the verdict therein was upheld in *Caldwell v. U.S., supra.*

It should be noted that neither of the foregoing cases involved direct contact either with the witness or with the juror, and this was one of the points specifically raised on appeal in the *Anderson* case. This should dispose of Appellant's contention (Br. 9) that the expressions "obstruct" and "impede" the due administration of justice as used in the statute refer only to direct acts of violence or menace disturbing the ordinary functions of the Court, in reliance of *U.S. v. Seeley*, C.C. S.D.N.Y. 1844, Fed. Case No. 16,248A.

Judge Learned Hand upheld an indictment under the omnibus clause of the statute charging a conspiracy to obstruct justice by influencing an Assistant District Attorney in his recommendations of sentence to the District Judge. *U.S. v. Polakoff, supra.*

It has been held that an indictment charging the defendant with corruptly obstructing the administration of justice by endeavoring to have a pending action dismissed by filing false letters and affidavits which had been fraudulently obtained stated an offense under the statute. *Nye v. U.S., supra.*

Although this issue was never raised, the Indictment in *Bosselman v. U.S.*, 2 Cir. 1917, 239 Fed. 82, charged

that the Defendant had corruptly influenced, obstructed, and impeded the due administration of justice by directing and requesting others to make certain erasures, changes and insertions in the books and records of a corporation material to matter under inquiry by the Grand Jury. So, too, in *Wilder v. U.S.*, 4 Cir. 1906, 143 Fed. 433, a conspiracy was charged under the omnibus clause of the statute to corruptly obstruct and impede the due administration of justice in a Court of the United States in a civil action between private parties, and this was held to be an offense under the statute.

Justice Field stated that the conduct of a witness before an examiner in chancery in being armed with a pistol and on occasion threatening to take the life of one of the counsel was an offense against the laws of the United States. He stated " . . . It interferes with the due order of proceedings in administration of justice, and is well calculated to bring them into contempt . . . " *Sharon v. Hill*, Cir. Ct. D. Calif. 1885, 24 Fed. 726, 729. In the same case Judge Sawyer stated that such conduct was an offense under the predecessor statute not only as an obstruction of an officer of the Court, but also impeding the due administration of justice. 24 Fed. at page 732.

The State Courts have held that the offense of obstructing or impeding the administration of justice may be committed by an abandonment by an attorney, in a criminal case, of his client on the day of trial in disregard of an order of the Court, simply because his fee had not been paid, *State v. Shay*, 3 Ohio N.P.,

N.S., 657, or by inducing another to bring a suit which is fraudulent and unjustified by the facts, *Melton v. Commonwealth*, 170 S.W. 37, 160 Ky. 642. 67 C.J.S. 53.

There is a great variety of cases in the reports dealing with corrupt endeavors to impede officers of the Court in one way or another. The one most analogous to this case is *People v. King*, 210 N.W. 235, 236 Mich. 405, in which it was held an offense under such a statute to induce *others* to resist officers in the execution of an ordinance.

Another case similar or analogous to the present case is *Astwood v. U.S.*, *supra*. There the Indictment charged the Defendant with endeavoring to influence, obstruct and impede the due administration of justice in the U.S. District Court by unlawfully and corruptly attempting to induce and entice a defendant to fail and neglect to appear in answer to a charge then and there pending against her. In the instant case, the Defendant Haili induced Harriet Bruce not only by persuasion but through physical violence not to report to the Probation Officer; that he was associating with her contrary to the terms of her probation, thus preventing the Probation Officer "from learning facts which he might otherwise learn, and in thus preventing him from deciding for himself whether or not to make use of such facts." *Wilder v. U.S.*, *supra*, 143 Fed. at page 441. When those facts ultimately did come to the attention of the Probation Officer, the record reflects that he filed a Motion for Revocation of Probation and as a result of this asso-

ciation of the Defendant with the Probationer, the Probationer's probation was revoked and she was sent to jail for two years. It is difficult to see where there could be a more clearcut case of obstruction of justice than has been demonstrated here.

Therefore, it would appear that although research has disclosed no other case which is identical in point of fact to the instant case, there is ample authority demonstrated in the foregoing analysis upon which this Court should properly conclude as the Trial Court did, that Count II of the Indictment herein, together with the particulars and evidence thereon, charges and involves an offense under 18 U.S.C. § 1503.

Appellant's Brief in this regard is addressed primarily to an argument of the evidence. Appellant acknowledges that "had he been told or directed by the Court or its Probation Officer not to associate with the Probationer or had he threatened the Probation Officer not to carry out the terms and conditions of probation relative to the Probationer . . . there would be no question that Appellant's conduct would have been covered by § 1503." (Br. 11.) What he is in effect saying is that there may be an offense under the statute for interfering with a probationer of the Court or with the Probation Officer, but under the facts of this case as he views them, there was no offense. It is inappropriate at this juncture to argue the evidence since the jury has found by way of its verdict of guilty that the Defendant did obstruct the due administration of justice. There is ample evidence in the record from which the jury could have so concluded, and that

is the only issue on appeal so long as the jury was properly instructed. Here follow the pertinent instructions given by the Court:

“The essential ingredients of the offense charged in Count II are:

1. That Germaine M. Haili did corruptly, and by threats and force, influence, obstruct, and impede the due administration of justice, or endeavor to influence, obstruct, and impede the due administration of justice.

2. That Germaine M. Haili entertained an intent to impede the due administration of justice.

3. That Germaine M. Haili had knowledge that justice was being administered.

“Unless these essential ingredients are proved beyond a reasonable doubt, you must acquit the defendant as to Count II of the indictment.” (R. 101.)

“The due administration of justice as used in the criminal statute and in count 2 includes the supervision of the terms and conditions of probation of the Court’s probationers by the Court through its probation officer.” (R. 103.)

In view of the foregoing analysis of the law relating to the due administration of justice and the obstruction thereof, there is no question but that these instructions were proper.

CONCLUSION.

It is respectfully submitted that the Trial Court did not err in any matter brought before it in the trial of this case and that the Judgment of that Court should be affirmed.

Dated, Honolulu, T. H.,
January 29, 1958.

LOUIS B. BLISSARD,
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By E. D. CRUMPACKER,
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Attorneys for Appellee.

No. 15,796

United States Court of Appeals
For the Ninth Circuit

G. A. MILLER, W. W. LORD, RALPH SMEED,
L. H. STAUS and JACK SMEED, Trustees
of John W. Smeed Estate,

Appellants,

vs.

SAM WAHYOU, DIAMOND-S RANCH CO., SAM
WAHYOU, K. R. NUTTING and THOMAS G.
LEE, as Trustees of the assets of Dia-
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QUONG, JOE SIN, K. R. NUTTING, YIP K.
TOON and HERBERT JANG,

Appellees.

Appeal from the United States District Court
for the District of Nevada.

APPELLANTS' PETITION FOR A REHEARING.

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*To the Honorable Walter L. Pope, Frederick G. Ham-
ley, and Wm. E. Orr, Circuit Court Judges:*

I.

STATEMENT OF REASONS WHY REHEARING SHOULD BE GRANTED.

A rehearing should be granted in this case for the
reason that an error in the opinion, of a fundamental

nature, if corrected, would reverse the holding of this Court.

Paragraph 2 of page 1 of the opinion of the United States Court of Appeals contains the following statement:

“Appellants appeal from a judgment based on said findings, upon the sole ground that the evidence is not sufficient to support the findings.”

We believe that this is an erroneous statement and respectfully call the Court's attention to transcript (2) page 21:

“6. The Court erred in granting Judgment to the defendants on Counts 2, 3 and 4 of the Amended Complaint for the reason that the burden of proof being on the defendants was not sustained.”

“7. The Court erred in failing to grant plaintiffs' Motion for Judgment at the close of defendants' case for the reason that the defendants failed to sustain the burden of proof as to the bona fides of the transaction.”

(From the statement of points upon which appellants intend to rely on appeal.)

II.

SUMMARY STATEMENT OF THE CASE.

The defendant Wahyou was the director of the Diamond S Ranch, a Nevada corporation, which had been dissolved. The defendant Archie Corbari owned 20 percent of the stock of the corporation at the time

of the dissolution, the certificate calling for 310 of the 1571 shares outstanding. Corbari had pledged the certificate of stock to the Bank of America at Stockton, California, prior to the dissolution of the corporation. While the corporation was in dissolution the pledge was purchased by Wahyou from the Bank. Prior to the time Wahyou purchased the pledge from the Bank, and after the corporation had been dissolved, Corbari gave an assignment to John W. Smeed, and these plaintiffs are the executors of the estate of John W. Smeed, deceased.

Wahyou foreclosed the pledge and purchased the certificate of stock at the foreclosure sale for \$5,000.00. After Wahyou purchased the certificate of stock the corporation was revived under the laws of Nevada.

The case was originally before the trial Court on motions for summary judgment by both sides. The trial Court found for the defendants, and on appeal the case was sent back to the trial Court with instructions that the burden of proof be placed upon the defendants to establish by a preponderance of the evidence the bona fides of the transaction. On retrial, at the close of the defendants' case the plaintiffs moved for judgment upon the ground and for the reason that defendants failed to sustain their burden of proof in this respect. This motion was denied. We believe that it should have been granted, and that there was no basis in the evidence or law for the Court's denial of the motion.

We believe that there is a total lack of any evidence on the part of Wahyou as to the bona fides of the

transaction, (*Faivret v. First Nat. Bank in Richmond, et al.*, 160 F. 2d 827, 831; *Pepper v. Litton*, 308 U.S. 295, 306, 84 L.Ed. 381, 60 S.Ct. 238) and that while the Court characterized the matter as conflicting but substantial to sustain the findings and conclusions, we believe that there is no evidence of any nature to sustain the findings and conclusions as set forth.

“The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm’s length bargain. If it does not, equity will set it aside.”

Lebold v. Inland Steel Co., 125 F. 2d 369;

Austrian v. Williams, 103 F. Supp. 64.

III.

DISCUSSION OF GROUNDS FOR REHEARING.

The defendant Wahyou occupied a dual position of trust. First, he was a trustee by the Nevada statutes, being the director of a dissolved corporation, and as such, is charged with the duties of a trustee.

Wahyou was in a fiduciary relationship as a pledge holder and could not purchase the property of the pledge unless he paid adequate consideration therefor, and he could not deal with the pledged property except in an arm’s length transaction.

The pledgee is held to the utmost of good faith in dealing with the pledged property.

English v. Culley, 259 P. 355;

76 A.L.R. 705, 722;

37 A.L.R. 2d 1381, 1383.

Let us review the evidence in the record that must be relied upon in order to sustain the position of the trial Court.

Wahyou testified twice by deposition and once in Court. (Transcript (1) pp. 102-105, Transcript (2) pp. 65-74, 148.) In each instance he testified that his purpose in purchasing the pledge was to foreclose it, and that he desired to make money and to protect himself on other obligations owed him by Corbari. In other words, his testimony was that he initiated the transaction for the sole purpose of protecting himself and making money from the deal. This could not have been an arm's length transaction! He repeatedly stated that he believed the property to be worth considerably more than he paid for it. In no instance did he ever say that he intended to pay any overplus to Corbari, but on the contrary, he said that he did not intend to do so. (Transcript (2) pp. 82-83.)

Our position is that the burden was upon Wahyou to prove by a preponderance of the evidence that he fully and fairly discharged his fiduciary duty to Corbari and to plaintiffs. This he could not possibly do when, by his own admission, he purchased the stock for the sole purpose of protecting himself on another debt owed him by Corbari and the only way to secure himself as to the second debt was to make money in purchasing the stock involved herein. A pledgee cannot deal at arm's length with the pledgor when, by his own admission, his intention was to make money out of the transaction.

Now let us examine the only other evidence available to show the bona fides of the transaction. The Court quotes at length from the balance sheet of the Diamond S Ranch and uses the book value of the stock as a basis of determining the value. However, the auditor, Mr. Buxton, on cross-examination (Transcript (2) pp. 63-64) testified that the book value does not in any way reflect the true value or the market value of the property. We feel that the auditor admitted that book value was irrelevant for the reason that it did not reflect the true value, that is, either the sale value or the market value of the property.

There were two other witnesses for Wahyou. Mr. Frank Hogue, who was a stockholder of the corporation and who testified that he paid \$35,000.00 for a one-third interest in the property. This is one of two sales of stock consummated during the period of time in which we are interested. This sale of 500 shares for \$35,000.00 amounts to approximately \$70.00 a share, whereas the purchase by Wahyou of the Corbari stock amounted to \$5,000.00 for 310 shares or \$14.00 a share. Certainly the testimony of the sale of stock in this matter did not establish the bona fides but on the contrary tended to show that Wahyou did profit from his fiduciary position.

The Court quotes from the testimony of witness Nutting, the other witness for Mr. Wahyou, as to the total value of the real property, but again we believe the Court overlooked the tremendously unfavorable testimony of Nutting, in that at page 28 of the second transcript, Nutting testified that he bought 489

shares of stock from Wahyou for \$20,000.00 which is \$40.00 per share. This purchase of stock together with the purchase by Hogue represent the only transactions in the stock during the time in which we are interested. One sale, that to Hogue, brought nearly \$70.00 a share, and the sale to Nutting brought \$40.00 a share. These were both sales by Wahyou and contrast vividly with his purchase of the stock from Corbari at \$14.00 a share.

The fact that Wahyou may or may not have made money out of the transaction is immaterial. The rule is that he must deal at arm's length with the best interests of his beneficiary or pledgor in consideration. There is not a single word anywhere in the transcript which indicates any desire or intention on the part of Wahyou to do that.

It is the position of the petitioners for rehearing that the burden placed upon Wahyou was not met and that there isn't a scintilla of evidence in the record which would support the burden placed upon him. On the contrary, the record is replete with evidence that he intended to, and tried to enrich himself at the expense of Corbari, who was the pledgor of the purchased stock.

The sole question comes down to this: Can a Court find, as a matter of law, that a man has acted at arm's length with the beneficiary or acted as a fiduciary should act even though the trustee fiduciary has testified that he intended to make a profit out of the transaction at the expense of the pledgor-beneficiary?

To have arrived at this decision it was necessary to completely ignore the testimony of the pledgee-trustee. From the very beginning he asserted an intention diametrically opposed to that trust placed upon him by law. He did everything he could to carry out that intention. How, then, could the Court say that he sustained the burden of proof and established his good intentions when every statement he made was to the contrary?

Stated another way, if the defendant Wahyou had accomplished what he set out to do, that is, to make 10 or 15 thousand dollars out of this transaction, the Court would have immediately set it aside for the reason that he could not profit at the expense of his beneficiary.

There is no proof that he hasn't, can't or won't profit from this transaction. The Court's attention is respectfully called to the fact that never has Wahyou said, "I don't think the stock is worth any more than I have paid for it and you can have it at that price." On the contrary, he has fought like a tiger to retain the valuable minority interest this stock represents.

Nowhere have the duties of the pledgee been any more carefully defined than by this Court in the case of *Faivret v. First Nat. Bank in Richmond*, 160 F. 2d 827, 831, wherein the Court, speaking through Judge Garrecht, says:

"In exercising the power of sale, the pledgee must act in good faith and safeguard the interests of the pledgor, and he is *bound* to exercise

reasonable care and diligence to obtain what the property is worth.” (Emphasis added.)

Nowhere is there a single word or inference that Wahyou did, or intended to, exercise reasonable care and diligence to obtain what the property was worth. The standard as recognized by this Court has not been met.

And as stated in the case of *Dibert v. Wernicke*, 6 Cir. 214 F. 673, 681:

“That even where a contract waives notice and permits a sale to himself, the pledgee is still a ‘trustee to sell,’ not to buy, though with the privilege of buying, if fairly sold.”

The Court found that there was conflicting but substantial evidence to support the findings of the District Court. In this we disagree. The price placed upon the real estate by Nutting is not verified by the money that he paid for the stock. If the ranch was of a value as testified to by him, why did he within six months of that time pay \$40.00 a share for 40 per cent of the stock? In other words, his testimony impeaches itself.

On the other hand, the defendant Wahyou did not produce a single impartial witness to testify as to the value of the property. The testimony is limited to Wahyou, Nutting and Hogue, all of whom are and were stockholders—Hogue paid \$70.00 a share for his stock, Nutting \$40.00 for his and Corbari received \$14.00 for his.

On the other hand, the very persons who testified as to the low value of this ranch secured a bank loan. The appraiser for the bank appraised the property at \$487,000.00, and the application for the loan was in the amount of \$225,000.00, which was approved.

We believe that a rehearing should be granted in this matter. As the case now stands a grave legal injustice has been done to these plaintiffs which can be corrected upon rehearing.

Dated, July 31, 1958.

Respectfully submitted,
PIKE & McLAUGHLIN,
SMITH & EWING,
CARVER, McCLENAHAN & GREENFIELD,
*Attorneys for Appellants
and Petitioners.*

CERTIFICATE OF COUNSEL.

We hereby certify that in our judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

Dated, July 31, 1958.

PIKE & McLAUGHLIN,
SMITH & EWING,
CARVER, McCLENAHAN & GREENFIELD,
*Attorneys for Appellants
and Petitioners.*



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Appeal from the United States District Court
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APPELLANTS' BRIEF.

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41 Am. Jur. 603, Pledge and Collateral Security, Section 67	24
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**United States Court of Appeals
For the Ninth Circuit**

G. A. MILLER, W. W. LORD, RALPH SMEED,
L. H. STAUS and JACK SMEED, Trustees
of John W. Smeed Estate,

Appellants,

vs.

SAM WAHYOU, DIAMOND-S RANCH CO., SAM
WAHYOU, K. R. NUTTING and THOMAS G.
LEE, as Trustees for the assets of Dia-
mond-S Ranch Co., THOMAS G. LEE, TOY
QUONG, JOE SIN, K. R. NUTTING, YIP K.
TOON and HERBERT JANG,

Appellees.

Appeal from the United States District Court
for the District of Nevada.

APPELLANTS' BRIEF.

I.

STATEMENT OF JURISDICTION.

Appellants, G. A. Miller, W. W. Lord, Ralph Smeed, L. H. Staus, and Jack Smeed, Trustees of John W. Smeed Estate, commenced this action as plaintiffs against A. E. Corbari and Marie Corbari, husband and wife, Sam Wahyou, Diamond-S Ranch

Co., a Nevada corporation, and K. R. Nutting, Thomas G. Lee, Sam Wahyou, and A. E. Corbari, as trustees for said corporation, asking for a money judgment against the defendants A. E. and Marie Corbari, praying that the assets of the defendant Diamond-S Ranch Co. be impressed with an equitable lien in favor of plaintiffs to secure the moneys alleged to be owed plaintiffs by the defendants A. E. and Marie Corbari, and, alternatively, for a money judgment against the defendant Sam Wahyou for the full amount of any money found due and owing plaintiffs from the defendants A. E. and Marie Corbari, including interest, attorneys' fees and costs. Thereafter, on October 21, 1954, plaintiffs filed an amended complaint (1T 25)¹ against Archie E. Corbari, Marie Corbari, Sam Wahyou, Diamond-S Ranch Co., a corporation, Forrest E. Macomber, A. E. Corbari, Sam Wahyou, K. R. Nutting, and Thomas G. Lee, as trustees for the assets of the Diamond-S Ranch Co., Thomas G. Lee, Toy Quong, Joe Sin, K. R. Nutting, Yip K. Toon, Herbert Jang, otherwise known as Herbert Jong, and D. W. Zignego. The relief demanded (1T 34, 35) consisted of a money judgment against the defendants Corbari, that a receiver be appointed to take over the assets of the Diamond-S Ranch Co., that plaintiffs be decreed a proportionate interests in the assets of the Diamond-S Ranch Co., for an accounting, that the defendants be enjoined

¹Page referrals to the transcript of record in Case No. 14,902, United States Court of Appeals for the Ninth Circuit, the initial appeal of this case, will be designated in the following manner, (1T); page referrals in Case No. 15,796 as, (2T).

from disposing of any of the assets of the Diamond-S Ranch Co., for an order directing that the property and assets of the Diamond-S Ranch Co. be sold and plaintiffs paid from the proceeds of the sale, and that plaintiffs have judgment against the defendants Wahyou, Macomber, Nutting, Lee, Quong, Sin, Toon and Jang (or Jong), and each of them, for payment of the obligation due and owing plaintiffs.

All defendants thereafter answered to the Amended Complaint (1T 41, 51, 57), but the action against the defendants D. W. Zignego and Forrest E. Macomber was dismissed by virtue of the pre-trial order of the District Judge dated January 18, 1955 (1T 130).

Both plaintiffs and defendants² filed motions for Summary Judgment. The District Court, on August 11, 1955 (1T 153), entered judgment in favor of plaintiffs as to the First Count of their amended complaint, against plaintiffs and in favor of defendants as to the Second, Third and Fourth Counts of the amended complaint, in favor of plaintiffs and against the defendants A. E. and Marie Corbari for costs, and in favor of all defendants except A. E. and Marie Corbari and against the plaintiffs, for the costs of those defendants. From this judgment plaintiffs appealed to this Court, and Notice of Appeal was filed on September 9, 1955 (1T 154).

The case having been argued and submitted and the Court being advised in the premises, on June 8,

²The parties will be referred to as plaintiffs and defendants in this brief.

1956, handed down its mandate, which mandate was in the following form (2T 3, 4, 5):

MANDATE

United States of America, ss:

The President of the United States of America
To the Honorable, the Judges of the United States
District Court for the District of Nevada,
Greeting

Whereas, lately in the United States District Court for the District of Nevada, before you or some of you, in a cause between G. A. Miller, et al., plaintiffs and Archie E. Corbari, etc., et al., defendants, No. 1029, a judgment was duly filed and entered on the 11th day of August, 1955, which said judgment is of record and fully set out in said cause in the office of the clerk of the said District Court, to which record reference is hereby made and the same is hereby expressly made a part hereof.

And Whereas, the said G. A. Miller, et al., appealed to this Court as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the Ninth Circuit by virtue of an appeal agreeably to the Act of Congress, in such cases made and provided, fully and at large appears.

And Whereas, on the 25th day of April, in the year of our Lord, one thousand nine hundred and fifty-six, the said cause came on to be heard from the said United States Court of Appeals for the Ninth Circuit, on the said transcript of record, and was duly submitted:

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is reversed and that this cause be, and hereby is remanded to the said District Court for a finding as to whether Wahyou has sustained such a burden of proof on the basis of the evidence presently in the record or any additional evidence the parties may offer with costs in this Court in favor of the appellants and against the appellees.

It is further ordered and adjudged by this Court that the appellants recover against the appellees for their costs herein expended and have execution therefor.

You, Therefore, Are Hereby Commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Earl Warren, Chief Justice of the United States, the twenty-third day of July, in the year of our Lord one thousand nine hundred and fifty-six.

(June 8, 1956.)

/s/ Paul P. O'Brien,
Clerk, United States Court of
Appeals for the Ninth Circuit.

Costs: Clerk \$25.00, Printing record \$413.87,
Total \$438.87.

(Endorsed): Filed August 6, 1956.

The case then came on regularly for trial before the Hon. John R. Ross, Judge of the District Court for the District of Nevada, on June 4, 1957, before the Court without a jury, for the purpose of taking evidence upon the issue specified in the mandate of the United States Court of Appeals for the Ninth Circuit, No. 14902, and entered on the 23rd day of July, 1956. The Court, after hearing the witnesses and considering the evidence as introduced, concluded as a matter of law as follows (2T 16, 17):

“1. That Plaintiffs are entitled to the judgment against the Defendants Archie E. Corbari, otherwise known as A. E. Corbari, and Marie Corbari, his wife, as heretofore determined by this Court in the Order granting Summary Judgment made and filed herein on August 11, 1955.

2. That Plaintiffs are entitled to take nothing against the Defendants Sam Wahyou, Diamond-S Ranch Co., a Nevada Corporation, Thomas G. Lee, Toy Quong, Joe Sin, K. R. Nutting, Yip K. Toon and Herbert Jang, otherwise known as Herbert Jong, and that the said Defendants are entitled to their costs of Court herein incurred.

Dated: September 20, 1957

Filed: September 20, 1957

John R. Ross
United States District Judge”

Plaintiffs are citizens of the State of Idaho. The defendants A. E. and Marie Corbari are citizens of the State of Nevada. The defendant Sam Wahyou, individually and as trustee, is a citizen of the State of California. The Diamond-S Ranch Co. was in-

incorporated under the laws of the State of Nevada with its principal place of business at Galconda, Nevada, and if it exists at all is a citizen of the State of Nevada. The defendants Nutting and Lee, individually and as trustees, are citizens of the State of California. The defendant Macomber is a citizen of the State of California. The defendants Quong, Sin, Toon, Jang (or Jong), and Zignego are citizens of the State of California.

The amount here in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars (\$3,000.00).

The District Court's jurisdiction in the action was based on Title 28, U.S.C.A., Sections 1332 and 1655. This Court has jurisdiction to determine this appeal under Title 28, U.S.C.A., Section 1291, and Rule 73, Federal Rules of Civil Procedure.

II.

STATEMENT OF THE CASE.

The facts in this case show that on or about December 31, 1948, the defendants A. E. Corbari and Marie Corbari made, executed and delivered to plaintiffs' decedent their promissory note in the amount of \$15,041.34 (1T 8), which amount with interest, except a payment of \$750.00 remains due, owing and unpaid (1T 146).

Thereafter on or about the 22nd day of February, 1950, A. E. Corbari agreed with the plaintiffs that he

would assign to plaintiffs as security for the payment of said note all of his interest in the Diamond-S Ranch Company, in which he owned 310 of 1572½ shares outstanding (1T 69). Following this agreement to assign, specifically on the 7th day of September, 1950, the directors of the Diamond-S Ranch Company, with the aid of Forrest Macomber, their attorney, effected a voluntary dissolution of the Diamond-S Ranch Company under the laws of the State of Nevada (1T 72, and Pre-trial Exhibit No. 8, 1T 131). Thereafter, on October 31, 1950, A. E. Corbari and Marie Corbari executed formal assignment (1T 84, 85) of all their right, title and interest in and to the assets of the Diamond-S Ranch Company, then a dissolved corporation, to plaintiffs.

Following the voluntary dissolution of the Diamond-S Ranch Company on September 7, 1950, the directors of the company, trustees under the statutes of Nevada, did not wind up the affairs of the corporation and distribute the assets as required to do by the laws of Nevada. Instead, they operated the corporation exactly as theretofore and continued to do so until the charter was attempted to be revived in December, 1951 (1T 72), without recognizing any interest in Corbari or in these plaintiffs.

Other pertinent facts are that on January 4, 1949, Corbari delivered to the Bank of America his 310 shares of Stock in the Diamond-S Ranch Company, a Nevada corporation, endorsed in blank as security for the payment of an obligation to the Bank, and at the same time executed a general pledge agreement to

the Bank (1T 106, 107, 108). On September 18, 1950, this pledge agreement was replaced with a new pledge executed by Corbari to the Bank of America (1T 108 and Pre-trial Exhibit 2, 1T 130), to secure the obligation owing to the Bank of America covered by the first pledge, and to further secure obligations owing to one Zignego and attorney Macomber. This second pledge was executed subsequent to the agreement to assign to Smeed of February 22, 1950, and subsequent to the dissolution of the corporation. Thereafter, on October 17, 1950, the Bank of America sold to the defendant, Sam Wahyou, Corbari's note (1T 48, 70 and 126) and the September 18, 1950, pledge (1T 106), in consideration of the payment by Wahyou of the balance due on Corbari's note to the Bank in the amount of \$5,000.00, plus interest. On February 9, 1951, Forrest Macomber, acting as attorney for Corbari and at the same time being the legally retained counsel for the Diamond-S Ranch Co. and for Sam Wahyou personally, wrote plaintiffs, offering to settle the obligation due them and secured by the assignment, for the sum of \$5,000.00 (1T 99), which offer was rejected. On March 26, 1951, plaintiffs' assignment of October 31, 1950, was recorded among the land records of Humboldt County, Nevada, the county in which the real property assets of Diamond-S Ranch Co. are located (1T 12).

On May 14, 1951 (Pre-trial Exhibit No. 4, 1T 131), the defendant Sam Wahyou signed a notice of sale of the stock of the Diamond-S Ranch Co. previously held by Corbari, to take place on May 21, 1951, and

in that notice recited that the sale was for the purpose of foreclosing a July 10, 1950, pledge of Corbari to the Bank of America which Wahyou had acquired. It should be here noted that the pledge referred to in the notice of sale can only be the second pledge agreement dated September 18, 1950 (Pre-trial Exhibit No. 2, 1T 130), and it should be further noted in that agreement that the date of July 10, 1950, is the date of the note being secured by the pledge, whereas the date of September 18, 1950, is the actual date of the pledge.

On May 21, 1951, the sale of the stock was made to one Gordon J. Aulik, an associate of Forrest Macomber, acting for and on behalf of Sam Wahyou (1T 107; 2T 73). The sale was conducted by Forrest Macomber, the attorney for Sam Wahyou, Corbari, and the Diamond-S Ranch Co. (2T 72, 73). Plaintiffs received no notice of this sale.

Following all of the transactions hereinbefore set forth, on October 10, 1951, the stockholders of the Diamond-S Ranch Company executed Appointment of Agent to revive the corporation, appointing Wahyou, Nutting and Lee as such agents (Pre-trial Exhibit 9, 1T 131). This instrument recited that defendants Wahyou, Nutting, Lee, Jang, Quong, Sin and Toon were holders of all of the stock and that Wahyou owned 631 shares. It should be noted that at dissolution Wahyou owned 321 shares, the difference being the Corbari stock.

On October 10, 1951, said agents executed under oath a Certificate of Revival or Renewal (Pre-trial

Exhibit 9, 1T 131), in which it was stated that the corporation had been carrying on its business since the date of its dissolution. On December 7, 1951, the certificate was filed with the Secretary of State of the State of Nevada (Pre-trial Exhibit 9, 1T 131), and on April 4, 1952, the Secretary of State issued his certificate of renewal (Pre-trial Exhibit 9, 1T 131).

The case having been returned to the District Court for a determination of whether or not the defendant Wahyou had sustained his burden of proof, trial was had before the Hon. John R. Ross. At this hearing the proof was limited as to the value of the stock which Wahyou had purchased to determine whether or not the transaction was fair.

III.

SPECIFICATION OF ERRORS.

1. The Court erred in failing to grant plaintiffs' Motion for Judgment at the close of defendants' case for the reason that the defendant Wahyou failed to sustain the burden of proof as to the bona fides of the transaction.

2. The Court erred in failing to find that the transaction on the part of Wahyou is one which would enrich the said Wahyou.

3. The Court erred in failing to find that the sale of the Corbari stock to Wahyou was void because Wahyou had made misuse of his office as Trustee.

4. The Court erred in failing to find that Wahyou stood in the shoes of the Bank of America as Pledgee when he foreclosed and purchased Corbari's stock, and as such he violated his fiduciary duty to Corbari, his Pledgor, by purchasing the stock for a grossly inadequate price.

5. The Court erred in failing to find that the Corbari stock was worth substantially more than the price paid by Wahyou and that as a result Wahyou unjustly enriched himself.

6. The Court erred in failing to find that Wahyou at the time he made the purchase of the Corbari stock intended and believed that he was purchasing stock of a substantially greater value than the price paid.

7. The Court erred in making and entering its Finding of Fact No. 14, such Finding of Fact being against the weight of evidence and in conflict with the admitted facts and is clearly erroneous.

8. The Court erred in making and entering its Findings of Fact No. 16 in that each statement of fact contained therein is erroneous and contrary to the evidence and that the evidence clearly showed the Corbari stock to have substantial value.

9. The Court erred in making and entering its Findings of Fact No. 17 in that each statement of fact therein contained is erroneous and contrary to the evidence and that the evidence clearly showed the Corbari stock to have substantial value.

10. The Court erred in making its Conclusion of Law No. 2.

11. The Court erred in entering the Judgment of September 27, 1957.

12. The Court erred in granting Judgment to the defendants on Counts 2, 3 and 4 of the Amended Complaint for the reason that the defendants failed to sustain their burden of proof.

13. The Findings of Fact and Conclusions of Law are contrary to the weight of evidence and are not supported by competent evidence.

IV.

ARGUMENT.

The principal proposition of law before the Court is simple and can be stated as follows:

I.

WHEN A TRUSTEE DEALS WITH THE BENEFICIARY'S INTEREST IN THE TRUST, THE BURDEN IS UPON THE TRUSTEE TO PROVE THAT THE TRANSACTION IS FAIR AND INVOLVED NO MISUSE OF HIS OFFICE.

The laws of California place a very high duty on the trustee. Applicable sections of the California Civil Code follow:

“Sec. 2224. One who gains a thing by * * * the violation of a trust is, unless he has some other and better right thereto, an involuntary trustee of the thing gained for the benefit of the person who would otherwise have had it.”

“Sec. 2228. Trustee’s obligation to good faith. In all matters connected with his trust, a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind.”

“Sec. 2231. Trustee’s influence not to be used for his advantage. A trustee may not use the influence which his position gives to him to obtain any advantage from his beneficiary.”

“Sec. 2233. To disclose adverse interest. If a trustee acquires any interest, or becomes charged with any duty, adverse to the interests of his beneficiary in the subject of the trust, he must immediately inform the latter thereof, and may be at once removed.”

“Sec. 2234. Trustee guilty of fraud, when. Every violation of the provisions of the preceding sections of this article is a fraud against the beneficiary of a trust.”

Section 2235 of the Civil Code of California provides:

“All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence.”

- A. Where a trustee fails to prove that a transaction by which he acquires his beneficiaries' interest in the trust property was fair and equitable and without undue influence, the transaction will be set aside.**

Entirely apart from the statute it is the universal rule of law that a fiduciary may not acquire his principal interest in trust property unless he deals openly, fairly and without undue influence. It is not an arms-length transaction.

3 Bogert, Trusts & Trustees 160, Section 493, expresses the rule thusly:

"Thus, if a trustee holds stock in trust and deserves to buy out the beneficiaries' interest, he should tell all he knows and believes about the present and probable future of the corporation whose stock he holds in trust, and, if he conceals information which he has that the corporation is about to be able to increase its profits greatly, he will not have performed his duty to the cestui, and the transaction will be voidable by the cestui. . . . Secondly, the Courts place upon the fiduciary who has received an advantage in a direct transaction with his principal the burden of showing that, if the arrangement purported to be one for a consideration, the consideration was adequate."

Winn v. Shugart, 112 F.2d 617 (CCA 10th 1940) enunciates the same rule. In that case a trustee purchased from his beneficiaries their interest in certain oil and gas property which was the corpus of the trust. Later the beneficiaries sued the trustee for an accounting and division of trust assets. The Court held that there was a complete absence of unfair dealing by the trustee, but announced the standard of

conduct to which a trustee must be held in the following language:

“It is necessary, therefore, only that we scrutinize the transaction of March 11, 1928, to ascertain if Shugart discharged that high degree of responsibility which the law placed upon a trustee, where he himself deals with the beneficiaries of the trust.

While transactions between a trustee and the cestui que trust are not prohibited, such transactions will be most severely scrutinized; a trustee may not profit by any transaction he may have in relation to the trust estate at the expense of the beneficiaries. In all his dealings with the trust estate he is held to the highest degree of candor and fairness. He must not only be strictly truthful in all his representation but must not remain silent concerning any matter of which he has knowledge that would throw light upon the trust estate. Courts of equity will set aside a transaction had by a trustee with the beneficiaries on the slightest ground. It would be needless to cite any authorities to sustain this statement. It is the unanimous holding of all Courts. It is in this light that the transaction must be viewed.”

When this case was returned to the Federal District Court of Nevada for hearing on whether or not the transaction complained of was fair and involved no misuse of the trustee's office, the burden of proof was placed upon the defendant Wahyou. The question before the Court is: Was that burden sustained? If that burden was not sustained, then the trial Court was in error in holding as it did, and judgment should

be entered for the plaintiff. It is well to remember that Wahyou was the trustee of the assets of a dissolved corporation and that the certificate of stock which he purchased from the bank had been pledged to the bank, not to him.

He stated in his first deposition that he purchased the stock from the bank because he thought it was worth more money than was owed on it, perhaps \$10,000.00 more (1T 112). Therefore, at the outset of this transaction, the purpose was stated by Wahyou, the trustee, that he intended to make money by purchasing the certificates. Thereafter, when the foreclosure took place, attorney Macomber, who represented Corbari, the Diamond-S Ranch Co. and Wahyou, made the arrangements for the sale, posted the notices and had his assistant, Aulit (2T 73) purchase the certificate of stock for Wahyou. The amount of the purchase price was the amount paid the bank for the pledge. It is interesting to note that there were no others at the sale and that there is no evidence that Corbari or Corbari's assignee Smeed had ever been notified of the time and place of the sale.

In reviewing the evidence as offered by the defendant Wahyou at the trial, there are two things to look for—proof to overcome the presumption of undue influence and proof to overcome the presumption of insufficient or lack of consideration.

The record is absolutely silent on lack of undue influence. The only proof as to the sale was that offered by Mr. Aulit, who simply testified as to the jurisdictional requirements having been met. There is no evi-

dence that Corbari was notified of the time, place or manner of sale. There was no evidence that Wahyou told Corbari that he believed the stock was worth more than he was going to pay for it and that he, Wahyou, would be able to gain back some of the money that Corbari owed him. On the other hand all of the evidence is that Wahyou's intentions were to make a profit for himself at the expense of his beneficiary.

From Wahyou's depositions of October 18, 1952 (1T 112), and October 20, 1956 (2T 158), it is perfectly obvious that Wahyou sincerely believed that the assets represented by the shares of stock which he bought was far in excess of the value that he paid for the certificate of stock. It is further obvious that he did not intend to credit Corbari's account or to give any of the profits to Corbari (2T 68, 69, 82, 83). Wahyou's intention to make a profit from this transaction as he has so eloquently stated in his two depositions and on direct examination is in the eyes of the law "unjust enrichment", and should void the sale.

Wahyou's entire course of conduct was one to gain for himself, from this transaction, money which would have gone to Corbari or Corbari's assignee had the transaction not taken place. Apparently every act and thing done to complete the transaction was done with this intention. If there was any intention to do anything for Corbari or Corbari's assignee, there is no evidence of that fact. The defendants, having rested without a scintilla of proof on this point, rested too soon and thereby encompassed their defeat.

B. A fiduciary acquiring his beneficiary's interest in trust property must pay fair and adequate consideration therefor.

In *Winn v. Shugart*, supra, the Court emphasized that:

“A trustee may not profit by any transaction he may have in relation to the trust estate at the expense of the beneficiaries.”

Thompson v. Afro-American Co., 185 F.2d 1014 (CCA 4th 1950) and *McDonald v. Hewlett*, 102 Cal. App. 2d 680, 228 P.2d 83, 24 ACR 2d 1281 (1951) are to the same effect.

This Court's opinion in *G. A. Miller, et al. v. Sam Wahyou, et al.*, 235 F.2d 612 (CCA 9th 1956) expressed the same view, where it was said:

“However, while a trustee may purchase his beneficiary's interest under the general law of trusts the trustee must carry the burden of proving that the transaction whereby he acquired the beneficiary's interest was fair and involved no misuse of his office.”

The *Thompson* and *McDonald* cases, supra, cited by this Court, establish that adequate consideration is one of the elements of fairness which the trustee is required to prove.

Let us view the evidence as submitted by the defendants in their attempt to meet this burden of proof. Their chief witness, of course, was Mr. Wahyou, and his testimony was replete with statements that he bought this stock for the purpose of making money and that he had no intention of crediting any overplus to Mr. Corbari or to the debt owed him by

Corbari. He also testified that they had offered the ranch for sale at prices ranging from \$150,000.00 to \$240,000.00 (2T 74, 75) and that in 1954 they offered it at a price close to a million dollars (2T 176-182). But the most interesting fact is that the corporation borrowed \$225,000.00 on this property in 1954 and that was on the real property alone. The deposition of Mr. Robert Wisecarver (2T 173) shows that Mr. Sam Wahyou requested the loan from the Central Valley Bank and that Mr. Wisecarver made the appraisal. The land was appraised at \$472,000.00 and the improvements at an additional \$14,300.00. The bank made a loan of \$225,000.00 with the ranch as security. Mr. Wisecarver also testified that the basis for loans on the part of the bank was 50% of the appraised value and that the value as fixed by Mr. Wisecarver was at that time to the best of his judgment a fair value of the property.

The book value of the land as shown by the comparative balance sheet was \$96,473.32 (Defendants' Exhibit No. 30B, 2T 25). If based on the Wisecarver appraisal, and certainly it was an impartial one, the real property was worth \$487,300.00, then the difference between the book value and the actual value of the real property was approximately \$400,000.00. A simple mathematical formula now may be applied to compute the actual value of the Corbari's stock. Corbari stock was 20% of the total outstanding, so for each one hundred thousand dollars of actual value of the corporation his certificate would represent a value of \$20,000.00. Therefore, if the market value of the

real estate was in excess of the book value, then for each one hundred thousand dollars of such additional value there would be an additional \$20,000.00 value to Corbari's stock. The book value of the land was \$96,472.42. Mr. Wisecarver appraised the property at \$487,300.00 or an additional value of \$381,000.00. This would give \$78,200.00 additional value to the Corbari certificate.

Mr. Charles Sewell qualified himself as an expert witness as to the value of real estate and with his knowledge of the property involved and the investigation he made of the property, testified as to a valuation of \$320,000.00 for the real estate (2T 96).

Mr. Harley McDowell, an appraiser, testified as to his inspection of the property and fixed the valuation at \$350,000.00 (Plaintiffs' Exhibit No. 3, 2T 25). Mr. Jack Utter, a real estate agent from Nevada, testified the value of the property was \$350,000.00 (2T 134).

Again reverting to our formula and the difference between the book value and the actual value of the property, the Corbari stock was worth, according to these appraisals, approximately \$50,000.00 as contrasted to the \$5,000.00 purchase price paid by Wahyou.

Even the testimony of the witness Hogue demonstrates that Wahyou paid a grossly inadequate price for the stock. In August of 1953 Mr. Frank Hogue testified (2T 41) that he had purchased one-third of the outstanding stock of this corporation from Mr. Wahyou and that he paid \$35,000.00 for the one-third

interest. This is in contrast to \$5,000.00 being paid for Mr. Corbari's 20%. The sale of the Corbari stock represented \$16.00 per share. The sale of the Wahyou stock to Hogue represented \$66.30 a share or a difference of \$50.00 per share. On that basis the Corbaris' stock had a value of \$15,500.00. This figure closely approximates Wahyou's estimate that he would make 10 or 15 thousand dollars out of the deal. It is further interesting to note that between the time of the sale of the Corbari certificate and the purchase of the Wahyou certificate by Hogue the corporation had lost \$400,000.00. This is shown by their comparative balance sheet (Exhibit B, 2T 25). The value of the one-third interest, had it been purchased on the comparative balance sheet figures of 1951 as compared with 1953, would have raised the value from \$35,000.00 to approximately \$135,000.00.

We further invite the Court's attention to the fact that every stockholder who testified at the hearing fixed the value of the land in excess of the book value. Mr. Nutting placed it at about \$60,000.00 more. Mr. Wahyou testified in his deposition that the property was worth \$150,000.00 to \$200,000.00 more than he paid for it (2T 162). The auditor, Mr. Buxton, testified that the value of the property on the books was cost (2T 64) and did not in any way reflect actual value. It is our position that if the property was worth any more than the book value, that value would have to be taken into consideration and being taken into consideration, it would raise the value of the certificate in excess of the amount Wahyou paid for

it. Wahyou did not have to buy this stock from the bank. He could have allowed the bank to sell the stock on foreclosure and he could have purchased it at the sale free and clear of any doubt as to the validity of the sale. However, he did not risk the bank selling the stock. Instead he purchased the pledge from the bank and conducted the sale himself. The very fact that he purchased the stock from the bank indicated that he had a plan in mind whereby he would acquire an advantage which he did not want to risk by letting the bank conduct the sale as the pledgee. The consideration paid by Wahyou for the stock was grossly inadequate and the sale should be voided.

II.

There is yet another reason why the transaction whereby Wahyou acquires the Corbari stock should be set aside.

A PLEDGE HOLDER IS IN A FIDUCIARY RELATIONSHIP WITH THE PLEDGOR AND MAY NOT PURCHASE THE PROPERTY OF THE PLEDGE UNLESS HE PAYS ADEQUATE CONSIDERATION THEREFOR.

It is the general rule of law, in the absence of a statute to the contrary, that a pledgee is incapacitated from becoming a bidder and purchasing the collateral held by him so as to free the property from the pledge and secure absolute title as against the pledgor (41 Am. Jur. 649; Pledge and Collateral Security, Section 90). This rule is considered in 3 Stanford Law Review 744 (1951) where the comment is:

“The well-established rule is that the pledgee may not obtain valid title to the property by purchasing at such a sale. The reason is clear. A pledgee owes a fiduciary duty to the pledgor to obtain the highest price reasonably possible on the sale. His own interest as a purchaser is to buy in the property as cheaply as possible. This conflict of interest and duty precludes a right to purchase the property.”

The pledge agreement here involved contains no reference to any right of the pledgee to purchase the subject matter of the pledge. Wahyou’s right to purchase stems solely from the California statute, California Civil Code, Section 3010, which reads as follows:

“Where property is sold at public auction, in the manner provided by Section three thousand and five of this Code, the pledgee or pledge holder may purchase said property at such sale.”

Wahyou, of course, stood in the shoes of the Bank of America, being charged with the same duties respecting the pledge as was the bank. 41 Am. Jur. 603, Pledge and Collateral Security, Section 67. His position was that of trustee of Corbari, the pledgor and Corbari’s assignees, these plaintiffs. *Ferro v. Citizens National Trust and Savings Bank*, 282 P.2d 849, 852 (Cal. 1955).

The Supreme Court of California had occasion to review a similar situation in the case of *Hudgen v. Chamberlain*, 120 Pac. 422 (Cal. 1911). In that case a debtor had pledged certain shares of stock to

creditor A and other shares of stock to creditor B. The pledge agreement in this case permitted sale at private or public auction with or without notice and gave the pledgee the right to purchase the pledged stock. Upon default of the debtors, the creditors and pledgees, acting in concert, placed a large block of stock on the market, creating a panic and forcing the price down from a fair market value of \$3.00 a share to a sudden low of \$2.00 a share. At that point they purchased the pledged stock, realizing their profit of approximately \$11,000.00. The Court held:

“It is, of course, well settled that a pledgee, under such contracts as are shown here, may sell the property pledged in satisfaction of the pledges and purchase the same at the sale thereof; the only requirement being that the sale shall be fair and bona fide . . .

“But we do not construe the complaints as alleging facts showing simply that the defendants, upon the default of the plaintiff, proceeded merely to exercise their legal rights to sell the stock in the then condition of the market, unaffected by any action on their part. On the contrary it appears from the allegations of the complaint that these defendants held their stock independently of each other, and each block of stock as a separate pledge for the payment of their individual notes, and they collusively agreed to jointly offer for sale the separate shares of stock pledged to each, with the sole purpose of thereby depreciating the value of the stock in the then existing market, thereby creating a panic, and as a result thereof lessening the value of the stock, so as to be able to purchase it at greatly reduced figures;

and that they did so. We think this clearly states a cause of action.”

English v. Culley, 259 P. 355 (Cal. App. 1927, hearing denied by Supreme Court October 31, 1927) was a case where a pledge holder bought the pledge for \$20,000 and subsequently sold it for a prearranged price of \$38,303.41. The Court held this to be a violation of the trust, saying:

“While this may generally be true, still the relation existing between parties to a transaction, where collateral security is placed in the hands of a pledgee as security for the payment of a debt with power of sale in the case of default, is in the nature of a trust. The responsibility of the pledgee to the pledgor is similar to that of a trustee; he holds the stock for specific purposes—namely, to return it to the pledgor in the event of payment of the indebtedness, or if sold by him either at public or private sale to so act that the sale will be fair and bona fide. The fact that the pledgee himself may become the purchaser, by reason of the Code provision, which was not permitted at common law, affords an additional reason why the pledgee is held to the utmost good faith in dealing with the pledged property. *Hudgens v. Chamberlain*, 161 Cal. 710, 120 P. 422.”

This general rule is further stated in 76 A. L. R. 705, 722 and the cases annotated therein:

“The validity and efficacy of a purchase of the subject of a pledge by the pledgee, under an agree-

ment authorizing the purchase, must be determined solely on facts of each case and all the attendant circumstances, and cannot be made the subject of a specific rule. It may be said, however, that the cases show that, regardless of how unlimited the power and authority of a pledgee to purchase the pledged property may be, he will be held to the strictest good faith in dealing with it, and will not be permitted wantonly to sacrifice it for his own benefit. His position is generally held to be that of a fiduciary, and the fact that the power to purchase is conferred on him will not relieve him of his duties as a trustee to sell. Though mere inadequacy of the price at which the subject of the pledge was purchased does not of itself show lack of good faith or due care, and though no notice of the sale need be given to the pledgor or the public when the pledge agreement waives such requirement, yet such circumstances, when weighed together with other facts which indicate that the pledgee is not attempting to realize the amount of the debt by the sale, but is merely attempting to secure for himself the full title to the property at the lowest possible price, are generally held to show a dealing with the property incompatible with the pledgee's fiduciary character, which will warrant the Court in holding the sale and purchase invalid."

We therefore urge that this sale should be voided, because Wahyou violated his fiduciary position as a pledgee in knowingly purchasing the stock for many times less than its fair and true value.



Appendix.

Appendix

(EXHIBITS)

Page referrals to the transcript of record in Case No. 14,902, United States Court of Appeals for the Ninth Circuit, the initial appeal of this case, will be designated in the columns in the following manner, 1T; page referrals in the transcript in Case No. 15,796 as, 2T

Exhibit 1	1T 130
Exhibit 2	1T 130
Exhibit 3	1T 131
Exhibit 4	1T 131
Exhibit 5	1T 131
Exhibit 6	1T 131
Exhibit 7	1T 131
Exhibit 8	1T 131
Exhibit 9	1T 131
Exhibit 10	1T 131
Exhibit 11	1T 132
Exhibit 12	1T 132
Exhibit 13	1T 132
Exhibit 14	1T 132
Exhibit 15	1T 132
Exhibit 16	1T 132
Exhibit 17	1T 132
Exhibit 18	1T 132
Exhibit 1P	2T 77
Exhibit 2P	2T 121
Exhibit 3P	2T 122

Exhibit 4P	2T 135
Exhibit 5P	2T 173
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Exhibit B	2T 43
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Exhibit D	2T 50
Exhibit E	2T 51
Exhibit F	2T 53
Exhibit G	2T 86

No. 15,796

United States Court of Appeals
For the Ninth Circuit

G. A. MILLER, W. W. LORD, RALPH SMEED,
L. H. STAUS and JACK SMEED, Trustees
of John W. Smeed Estate,

Appellants,

VS.

SAM WAHYOU, DIAMOND-S RANCH Co., SAM
WAHYOU, K. R. NUTTING and THOMAS G.
LEE, as Trustees for the assets of Dia-
mond-S Ranch Co., THOMAS G. LEE, TOY
QUONG, JOE SIN, K. R. NUTTING, YIP K.
TOON and HERBERT JANG,

Appellees.

Appeal from the United States District Court
for the District of Nevada.

APPELLEES' BRIEF.

JOHN S. HALLEY,
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FILED

MAR 21 1958

PAUL P. O'BRIEN, CLERK

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**United States Court of Appeals
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G. A. MILLER, W. W. LORD, RALPH SMEED,
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SAM WAHYOU, DIAMOND-S RANCH CO., SAM
WAHYOU, K. R. NUTTING and THOMAS G.
LEE, as Trustees for the assets of Dia-
mond-S Ranch Co., THOMAS G. LEE, TOY
QUONG, JOE SIN, K. R. NUTTING, YIP K.
TOON and HERBERT JANG,

Appellees.

**Appeal from the United States District Court
for the District of Nevada.**

APPELLEES' BRIEF.

STATEMENT OF THE CASE.

Appellants' statement of the case is in error in several respects.

At Page 8, Paragraph 2, of Appellants' Brief, they state that following the voluntary dissolution of the Diamond-S Ranch Co., on September 7, 1950, the

Directors * * * did not wind up the affairs of the corporation and distribute the assets as required to do by the laws of Nevada. The laws of Nevada specifically provided that the corporation could renew and revive its corporate charter and said renewal or revivor could be effective as of the date it filed its dissolution, and that was done in this case. (Exhibit 9, 1 T 141.)

In the first paragraph of Page 9 of Appellants' Statement of Facts, they state that on September 18, 1950, this Pledge Agreement *was replaced* with a new pledge executed by Corbari to the Bank of America. The second Pledge Agreement was not to replace the first Pledge Agreement but merely extended the Pledge Agreement executed by Corbari to the Bank of America to cover additional obligations of Corbari's. (Exhibits 1 and 2, 1 T 130.)

In addition to the matters set forth in Appellants' Statement of Facts, Appellees direct this Court's attention to the fact that Corbari was long in default of his payments to the Bank of America and the Bank had made numerous demands upon Corbari to pay off the note or it would sell his 310 Shares of stock which he had pledged to secure the payment thereof. (Exhibits 14, 15 and 16, 1 T 132.) Likewise, long before Wahyou purchased the Corbari note and the pledged security from the Bank of America, Appellants had notice that the Corbari stock was pledged to the Bank of America to secure a loan owing by Corbari to the Bank and were given an opportunity to pay off that loan and secure Corbari's

stock to secure the indebtedness owing by Corbari to Appellants (Exhibit 17, 1 T 132 and 1 T 141), but this Appellants refused to do.

PRELIMINARY STATEMENT.

In the prior decision of this Court in this same case, this Court disposed of all of the contentions made by Appellants and sent the case back to the lower Court for the narrow and limited purpose "for a finding as to whether Wahyou has sustained such a burden of proof on the basis of the evidence presently in the record or any additional evidence the parties may offer." However, it will be observed that this Court, in reply to Appellants' assertion that Wahyou was in a fiduciary relationship toward Appellants or Corbari, stated:

"Corbari's interest was not part of the trust over which Wahyou was a trustee. The Nevada Legislature imposed the duties of a trustee upon the directors of a dissolved corporation with regard to their powers to liquidate the corporate assets, pay creditors and distribute the net proceeds to the shareholders. The Nevada statutes make no mention of any powers over a shareholder's interest, and it seems clear the corporate liquidators have no control over how a particular shareholder deals with his interest.

The reasons why a trustee may not purchase trust property at a foreclosure sale are not applicable to what was done by Wahyou in this case."

"On the other hand, a trustee has no duty to buy one beneficiary's interest for the benefit of other

beneficiaries: Wahyou was in no position to decide whether Corbari's interest should be redeemed or sold. Whether Wahyou made a low or a high bid for Corbari's interest did not affect the dissolved corporation's financial position. Wahyou, as a result of the purchase, did not occupy a personal position adverse to his duties as a trustee. He was already both a shareholder-beneficiary and a director-trustee."

**ARGUMENT IN REPLY TO APPELLANTS'
SPECIFICATIONS OF ERRORS.**

Appellants' thirteen Specifications of Errors are but thirteen different ways of saying that the Findings of Fact made by the trial Court are not supported by the evidence.

Appellants, however, do not comply with Rule 18 (d) of the Rules of the United States Court of Appeals for the Ninth Circuit in that they do not "state as particularly as may be wherein the Findings of Fact and Conclusions of Law are alleged to be erroneous." Instead of abiding by said Rule, the Appellants pick out isolated portions of the evidence most favorable to Appellants and argue that the Court committed error in failing to find in favor of Appellants on the basis of those selected portions of the evidence that Appellants find most favorable to themselves.

Rule 52(a) of the Federal Rules of Civil Procedure provides as follows:

“Rule 52. Findings by the Court.

(a) Effect. * * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.”

In:

Fremont Cake & Meal Co. v. Wilson & Co.,
183 Fed. 2d 57,

it was stated that findings of the trial court are presumptively correct. In:

Rogers v. Union Pac. R. Co., C.C.A. 9th, Sept. 1, 1944, 145 Fed. 2d 119,

it was stated that a trial court's fact finding, supported by substantial evidence, must be accepted as correct on appeal. In:

Ashton v. Sentney, C.C.A. 9th, Dec. 5, 1944, 145 Fed. 2d 719,

it was stated that demeanor of witnesses and their sincerity and candor is for trial tribunal. In:

Remington Rand Inc. v. Societe Internationale, etc., C.C.A.-D.C., Mar. 29, 1951, 188 Fed. 2d 1011,

it was stated that where trial involves disputed factual issues, the findings of fact by the trial court should not be set aside unless clearly erroneous and due regard should be given to the opportunity of the trial court to judge the credibility of the witnesses.

See, also:

Chisholm v. House, C.C.A. 10th, July 26, 1950, 183 Fed. 2d 698,

wherein the Court stated:

“(4) With commendable care, the trial court took up and separately considered each loan to determine whether or not it was prudently made, and if not, whether the estate had suffered a loss as a result of such imprudency. It found and concluded that most of the challenged loans on the real estate were prudently made, and absolved the trustees and surety from liability thereon. Its analysis and conclusions on these transactions are not clearly erroneous, and they must stand.”

See, also:

United States v. Oregon State Medical Society,
343 U.S. 326, 96 L. Ed. 978, 72 S. Ct. 690,

which was a case very much like the one at bar in that the complaining party created a vast record of cumulative evidence as to long past transactions, motives and purposes, the effect of which depends largely on credibility of witnesses, and in the *Oregon State Medical Society* case Justice Jackson, who delivered the Opinion of the Court, stated:

“While Congress has provided direct appeal to this Court, it also has provided that where an action is tried by a court without a jury ‘findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.’ Rule 52(a), Fed. Rules of Civ. Proc. There is no case more appropriate for adherence to this rule than one in which the complaining party creates a vast record of cumulative evidence as to long-past transactions, motives, and purposes, the effect of which depends largely on credibility of witnesses.”

See, also:

United States v. Yellow Cab Co., 338 U.S. 338,
94 L. Ed. 150,

which states:

“Only last term we accepted the view then advanced by the Government that for triers of fact totally to reject an opposed view impeaches neither their impartiality nor the propriety of their conclusions. We said, ‘We are constrained to reject the court’s conclusion that an objective finder of fact could not resolve all factual conflicts arising in a legal proceeding in favor of one litigant. The ordinary lawsuit, civil or criminal, normally depends for its resolution on which version of the facts in dispute is accepted by the trier of fact. . . .’ *National Labor Relations Board v. Pittsburgh SS Co.* 337 US 656, 659, 93 L ed 1602, 1605, 69 S Ct 1283.

Rule 52, Federal Rules of Civil Procedure, provides, among other things:

‘Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.’

Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them. If defendants’ witnesses spoke the truth, the findings are admittedly justified. The trial court listened to and observed the officers who had made the records from which the Government would draw an inference of guilt and concluded that they bear a different meaning from that for which the Government contends.”

After the mandate of this Court came down, the trial Court heard such evidence as both sides cared to present, and after hearing the cause was submitted and the trial Court made its Findings of Fact and Conclusions of Law, which are set forth at length in the transcript. (2 T 5 to 17.) The essential Findings are as follows:

“14. That at the time said document of October 31, 1950, was executed and delivered, and for some months prior thereto, Plaintiffs had notice of and knowledge that Defendant Archie E. Corbari's 310 shares of the Common Capital Stock in Diamond-S Ranch Co. had been pledged to the Bank of America N. T. & S. A., Hunter Square Branch, Stockton, California, in order to secure the Corbari's indebtedness to said Bank.” (2 T 14.)

“15. That it is true that after the Defendant Sam Wahyou purchased the Defendant Archie Corbari's note from the said Bank of America and the Defendant Archie Corbari failed to pay said note unto the Defendant Sam Wahyou, and by reason of the nonpayment of said note to the Defendant Sam Wahyou, the said Defendant Sam Wahyou caused said stock to be sold under the terms of said pledge agreements and pursuant to the laws of the State of California relating to sales of pledged property, and on May 21, 1951, said 310 shares of the Common Capital Stock of Diamond-S Ranch Co., the subject matter of said pledge, were sold at public auction at the Main St. Entrance to the County Courthouse in the City of Stockton, County of San Joaquin, State of California, in accordance with the laws of the

State of California, and said 310 shares were purchased by Gordon J. Aulik as agent for Sam Wahyou and in the name of Sam Wahyou for the sum of \$5,500.00.

16. That it is true that the said sale was fairly made in accordance with the laws of the State of California relating to the sale of pledged property and fairly conducted, and the Defendant Sam Wahyou has sustained the burden of proving and has proven that there was no fraud or misrepresentation or other unfair means involved in the purchase of said shares by the Defendant Sam Wahyou, and it is true that the transaction whereby the said Defendant Sam Wahyou acquired the Defendant Archie E. Corbari's stock was fair and that the reasonable value of the shares of stock at the time of the purchase thereof by Defendant Sam Wahyou at said sale on May 21, 1951, was nil and that the said shares after the date of purchase and up to the time of the trial of this action were of no value whatsoever.

17. That it is true that insofar as the value of said stock was concerned as of the date of its sale at public auction and its purchase by Defendant Sam Wahyou on May 21, 1951, there were no facts within the knowledge of the said Defendant Sam Wahyou that were not equally available to Plaintiffs or the Defendant Archie E. Corbari." (2 T 15 and 16.)

At this point, Appellees desire to point out that the Findings show that Wahyou sustained the burden of proving that the transaction whereby he acquired Corbari's stock was fair.

Burden of proof means persuading the mind of the trier of fact that the truth of a particular matter lies in favor of the person upon whom falls the first duty of going forward with the evidence. This duty is a duty toward the judge and the judge rules against the party if it is not satisfied. When the judge has ruled that sufficient evidence has been introduced, the duty has then ended. See:

Wigmore on Evidence, Vol. 9, Third Edition,
Par. 2487, Pages 278 and 279.

The trier of fact, in this case the trial Judge, was satisfied with the proof produced by Appellees and thus found in their favor.

Although Appellants have failed to sustain their burden of pointing out to this Court exactly wherein in the record the Findings of Fact and Conclusions of Law are alleged to be erroneous, Appellees feel it is their duty to apprise this Court of those portions of the record that do clearly and unequivocally sustain the Findings of Fact and Conclusions of Law of the trial Court.

It was stipulated that the Court could take judicial notice of the laws of California dealing with pledge sales and foreclosure of pledges. That law is contained in Sections 2986 to 3011, inclusive, of the Civil Code of California, and Sections 692 and 694 of the Code of Civil Procedure of California. Section 3010 of the Civil Code of California provides as follows:

“§ 3010. (Pledgee or pledge-holder may purchase.) Whenever property pledged is sold at

public auction, in the manner provided by section three thousand and five of this code, the pledgee or pledge-holder may purchase said property at such sale."

and the Code of Civil Procedure Sections provide essentially that notice of the sale must be given by posting written notice of the time and place of sale in three public places in the city where the property is to be sold for not less than five nor more than ten days. The Affidavit of the Constable as to the posting of the notice was admitted in evidence (Exhibit 5), Notice of the sale was admitted in evidence (Exhibit 3), Affidavit of Forrest E. Macomber as to the sale was admitted in evidence (Exhibit 2) (1 T 131). Gordon J. Aulik, who purchased the Corbari shares at the public auction sale, testified fully with respect thereto (2 T 71) and the Court made an appropriate Finding that the sale was fairly made in accordance with the laws of the State of California relating to sales of pledged property and fairly conducted. Appellants in their Brief cite 3 Stanford Law Review 744 and a citation from 41 Am. Jur. 649, in which Appellants contend that it is a general rule of law that a pledgee is incapacitated from becoming a bidder at the sale. The note in 3 Stanford Law Review Page 743 specifically points out that the statutes of California permit the pledgee to purchase at the sale (at Page 745). The law only demands on the pledgee good faith in dealing with the pledged property. Appellants attack the validity of the sale upon the

ground that Wahyou violated his fiduciary position as a pledgee in knowingly purchasing the stock for many times less than its fair and true value. The evidence before the trial Court as to the value of the stock consisted of showing the book value of the stock for the years ending December 31, 1950, to 1956, inclusive. These were the only dates upon which Balance Sheets were made up (Defendants' Exhibit B, 2 T 44 and 46). That Balance Sheet shows that the assets of Diamond-S Ranch Co. for the year ending December 31, 1950, were, in round figures, \$142,000.00 (book value) and the liabilities, exclusive of Capital Stock, were \$144,000.00, making the common stock worth \$2,000.00 less than nothing at book value. Appellants contended that the Balance Sheet was in error in that the ranch land and improvements were of a greater or higher value than the book value, and this point we will discuss later in this Brief. The same Balance Sheet showed that at the year ending December 31, 1951, the assets of the Diamond-S Ranch Co. had a book value of \$303,000.00 and the liabilities, exclusive of Capital Stock, were \$310,000.00, and the Capital Stock was worth some \$7,000.00 less than nothing. This same condition prevailed so that at the end of 1952 the Capital Stock was worth approximately \$66,000.00 less than nothing; 1953, \$389,000.00 less than nothing; 1954, \$445,000.00 less than nothing; 1955, \$720,000.00 less than nothing; and 1956, \$878,000.00 less than nothing.

With respect to the value of the land and improvements, the book values were as follows:

Dec. 31, 1950—	\$137,219.14
Dec. 31, 1951—	\$129,591.12
Dec. 31, 1952—	\$146,606.04
Dec. 31, 1953—	\$159,918.27
Dec. 31, 1954—	\$195,076.20
Dec. 31, 1955—	\$216,820.62
Dec. 31, 1956—	\$229,162.32

Considerable testimony was introduced as to the value of the land and improvements as of May 21, 1951, which was the date that the pledge sale was held. Following is a portion of that evidence, which Appellees maintain adequately supports the Findings of Fact and Conclusions of Law made by the trial Court:

KENNETH R. NUTTING, a witness produced by Appellees, testified that on or about June 15, 1950, he acquired 489 Shares, or approximately 32% of the stock of Diamond-S Ranch Co., for \$20,000.00, but upon condition that the \$20,000.00 be reinvested in the ranch as operating capital (2 T 28) and that on or about August 30, 1953, he gave 104 Shares free gratis to Mr. Hogue (2 T 30) to the end that Wahyou, Hogue and Nutting would each own $\frac{1}{3}$ of the stock. He described the physical condition of the ranch in 1951 (2 T 31), and that in his opinion the ranch was worth approximately \$150,000.00 in 1951, and he based that opinion partly upon the fact that ranches in Nevada sell for \$150.00 for each head of cattle that it is capable of supporting. (2 T 32.) The ranch itself would carry a total of 300 head of cattle and the Taylor Grazing Rights and leased land would carry

an additional 700 head of cattle or animal units (2 T 36); that his valuation of \$150,000.00 for the ranch was based upon his estimate that it would carry a total of 1,000 head on the ranch as well as on the leased land and Taylor Grazing Rights (2 T 37); that if the ranch, together with the Taylor Grazing Rights and leased land, carried less than 1,000 head, he would reduce the value accordingly (2 T 37); that the leased land was on a lease for one year only (2 T 37 and 38) and that if either the Southern Pacific Company or Milham, the owners of the land, did not care to renew the lease, they would be under no obligation to do so. (2 T 39.)

MR. FRANK H. HOGUE, a witness on behalf of Appellees, testified as follows: He owns one-third of the outstanding stock of Diamond-S Ranch Co. (2 T 40.) He acquired 104 shares from Mr. Nutting in 1953, for which he paid nothing. He paid Wahyou \$35,000.00 for an additional 500 shares on condition that the \$35,000.00 should go into financing the ranch. (2 T 41.)

SAM WAHYOU testified that at the time of sale of the Corbari stock at public auction on May 21, 1951, Mr. Corbari was a Director of the Corporation (2 T 66); he, Corbari, was operating the ranch at that time as superintendent (2 T 66); Corbari owed him money at that time (2 T 66); the Bank of America was threatening to foreclose the pledge on Corbari's stock (2 T 67); Corbari asked him to buy the stock so the Bank would not foreclose it (2 T 67); he arranged with the Bank to pay for the stock and

his lawyer, Macomber, arranged for the assignment of the Corbari note and the pledge of the stock to Wahyou (2 T 68); that at the time he bought Corbari's stock he felt that the ranch had a future and that the stock was worth more than \$5,000.00 and he would not want somebody outside to hold the stock, that is why he bought it. Corbari owed him money and he thought it was a pretty fair buy for what he paid for it so he bought it (2 T 68); that he expected to make money on the purchase of the Corbari stock or he would not have bought it but he did not make any money as a result of that purchase (2 T 69); he has tried to sell the ranch many times since 1948, 1949, 1950 and up to date and he has been unable to get anyone to purchase the ranch (2 T 74); that after 1951 they spent a great deal of money fixing up the ranch (2 T 80); his financial statement to the Bank to secure a loan as of December 31, 1955, shows his stock in the Diamond-S Ranch Co. to be of no value. (2 T 85 and 86.)

MR. CHARLES SEWELL, a witness on behalf of the *Appellants*, testified that his appraisal is based in part upon the number of animal units the ranch would carry in 1951 (2 T 99); he further testified that it is usual to take into consideration in buying or selling Nevada ranches the animal carrying capacity, or A.U.'s (animal units) (2 T 100); he believes that the ranch is worth \$200.00 per animal unit (2 T 100), although he sold a ranch in this particular area of the Diamond-S Ranch last Fall for \$150.00 per animal unit. (2 T 101.) He further testified that

if the leases were terminated, some of the value would be gone. (2 T 106.)

MR. HARLEY M. McDOWELL, a witness on behalf of the *Appellants*, testified that in his appraisal of the value of the ranch, he considered the carrying capacity of the ranch (2 T 114); the leased lands were leased for a period of only one year and the use of the lands from year to year is dependent entirely upon renewing those leases. (2 T 126.)

MR. JACK UTTER, a witness on behalf of *Appellants*, testified that he based his appraisal on so much per animal unit carrying capacity (2 T 139); he figured the ranch would run about 1,500 head at \$200.00 a head (2 T 139-140), although he can't say how many head of cattle the ranch actually carried in 1951 or how many head it could carry (2 T 140); the asking price of the CS Ranch is \$165.00 per animal unit (2 T 143); there is nothing about the Diamond-S Ranch that was any different from any cattle ranch. (2 T 145.)

It was stipulated that the animal carrying capacity on the Federal range land was 1,771 aum's, or animal unit months, and 1,921 aum's upon the leased land, or a total of 3,692 animal unit months altogether, and that for a five-month period.

Mr. Nutting's testimony that the ranch itself, without the leased land or the Taylor Grazing Rights, would carry 300 head of cattle, would give a valuation to the ranch as follows:

300 head of cattle x \$150.00 per head, would give the ranch a value of \$45,000.00 and no more.

At \$200.00 per animal unit, the ranch would be worth \$60,000.00. In addition to this, the ranch was worth something by reason of the Taylor Grazing Rights and leased land grazing rights; however, it must be remembered that the leased land rights were subject to being cut off by failure to renew the lease at any time, and little value could thus be placed upon the leased land rights. The Federal range land, or Taylor Grazing Rights, consisted of 1,771 aum's, or animal unit months. This 1,771 divided by 12 months, means that the Federal range land was capable of grazing $147\frac{1}{2}$ head of cattle per month all year 'round, or twice that number for a six-months' period, etc. It was stipulated that the leased land would carry 1,921 aum's, or animal unit months, or, worked another way, it would carry 1,921 divided by 12, or 160 head of cattle each month for 12 months. All of the witnesses who testified to value agreed that it would be based upon animal units or the animal carrying capacity of the ranch and its grazing rights. The Court was undoubtedly familiar with the value of cattle ranches in Nevada and knew that the principal test of the value of a cattle ranch in Nevada is based upon the carrying capacity and that as Appellants' as well as Appellees' witnesses testified, the ranch would be worth somewhere between \$150.00 and \$200.00—one of Appellants' witnesses testified to \$225.00—per animal unit. At the rate of \$150.00 per animal unit, allowing 300 head animal carrying capacity or animal units for the main ranch and 160 animal units for the leased land and 147 animal units for the Federal range land, would make a total of 607 animal units

altogether, and at \$150.00 per head this would make the ranch worth \$91,050. It was the province of the trial Court to determine the true value of the Diamond-S Ranch, and this the trial Court did, and after such determination the trial Court has found specifically that the value of the Corbari shares of stock at the time of the purchase thereof by Wahyou on May 21, 1951, was nil—of no value whatsoever, and that since that time, as of December 31, 1956, the book value of the shares was \$878,000.00 less than nothing.

In Point One of their argument, Appellants cite a number of California Civil Code Sections and citations from other authorities which have to do with trustees of an express trust, but they are elemental rules of the law of trusts and throw no light upon the case at bar. At page 16 of their Brief, Appellants state that the question before the Court is, was the burden of proof sustained by Wahyou. That was a matter for the determination of the trial Court after a consideration of all of the evidence, and after the trial Court had accorded due weight to such of the evidence as it thought it should have, and the trial Court concluded that the answer to this question was “yes”, and unless those Findings are clearly erroneous, this Court will not overturn the trial Court’s Findings.

At page 17 of Appellant’s Brief, Appellants state that the certificate of stock which Wahyou purchased from the Bank had been pledged to the Bank, not to him. This is true, but the Bank had assigned the note and the pledged property to Wahyou for a valuable

consideration, to-wit: the sum of \$5,500.00. Appellants likewise state that there was no evidence that Corbari or Smeed had ever been notified of the time and place of the sale, but Notice of Non-Performance and Notice of Time and Place of Sale was expressly waived by Corbari. See Pledge Agreement to the Bank of America. (Exhibit 1, 1 T 130.) Smeed, of course, had known for many months that Corbari had pledged this stock to the Bank of America for a loan and was unwilling to pay off the balance due to the Bank as Wahyou had done and secured Corbari's stock to secure the indebtedness owing to it by Corbari. Appellants likewise state that Attorney Macomber posted the Notices of Sale. That is not true. The Notices of Sale were posted by the Constable. (Exhibit 5, 1 T 131.) Appellants speak of undue influence and state that there was no evidence that Wahyou told Corbari that he believed the stock was worth more than he was going to pay for it, but Corbari was a Director of the Corporation at the time of the sale, he was the Manager and in charge of the operation of the ranch, and he was in a position to know as much about the value of the stock, if not more, than any other person, and he had expressly waived notice of time and place of sale when he signed the General Pledge Agreement to the Bank of America.

The next point made by Appellants is that Wahyou must pay fair and adequate consideration for the stock, and their argument seems to be that if the stock was worth any more than Wahyou paid for it

he would have to pay the difference between what he paid for it and what it was worth to Corbari or Corbari's assignee, but that argument falls for two (2) reasons: One, that it not the law and the cases do not so hold; and, two, the Court found that the value of the stock at the time of its purchase by Wahyou was less than nothing, and that determination is adequately supported by the evidence, as hereinbefore set forth in detail, and that by the end of 1956 the liabilities of the Diamond-S Ranch Co. exceeded its assets by some \$878,000.00.

The next point made by Appellants in their Brief is that Wahyou stood in the shoes of the Bank of America, being charged with the same duties respecting the pledge as was the Bank, and could not take advantage of Corbari. We agree wholeheartedly with this statement, and if Wahyou had not purchased the note and collateral from the Bank of America and it had sold Corbari's stock as did Wahyou, there could be not the slightest argument that the Bank of America was entitled to sell the stock and buy it in themselves for the amount owing upon it to them.

CONCLUSION.

We submit that the determination of whether Wahyou acted fairly in the sale of the pledged stock and the purchase of it and whether he sustained the burden of proof of so showing was for the determination of the trial Court, and that the trial Court has determined all of these matters in favor of Appellees

and that the Findings of Fact are extremely well supported by the evidence. We likewise respectfully suggest that this appeal has no merit whatsoever and was taken for the purpose of harassing and annoying Appellees.

Dated, March 17, 1958.

Respectfully submitted,

JOHN S. HALLEY,

FORREST E. MACOMBER,

Attorneys for Appellees.

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No. 15796

United States
Court of Appeals
for the Ninth Circuit

G. A. MILLER, W. W. LORD, RALPH SMEED,
L. H. STAUS and JACK SMEED, Trustees
of John W. Smeed Estate, Appellants,

vs.

ARCHIE E. CORBARI, etc., et al., Appellees.

Transcript of Record

Appeal from the United States District Court
for the District of Nevada

FILED

JAN 23 1938

PAUL R. BARNETT, CLERK



No. 15796

United States
Court of Appeals
for the Ninth Circuit

G. A. MILLER, W. W. LORD, RALPH SMEED,
L. H. STAUS and JACK SMEED, Trustees
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Transcript of Record

Appeal from the United States District Court
for the District of Nevada

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Stockton, Calif.,

For Appellees.

United States Court of Appeals
For The Ninth Circuit

No. 14902

G. A. MILLER, et al., Plaintiffs,

vs.

SAM WAHYOU, et al., Defendants.

MANDATE

United States of America, ss:

The President of the United States of America

To the Honorable, the Judges of the United States
District Court for the District of Nevada,
Greeting:

Whereas, lately in the United States District Court for the District of Nevada, before you or some of you, in a cause between G. A. Miller, et al., plaintiffs and Archie E. Corbari, etc., et al., defendants, No. 1029, a judgment was duly filed and entered on the 11th day of August, 1955, which said judgment is of record and fully set out in said cause in the office of the clerk of the said District Court, to which record reference is hereby made and the same is hereby expressly made a part hereof.

And Whereas, the said G. A. Miller, et al., appealed to this court as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court

of Appeals for the Ninth Circuit by virtue of an appeal agreeably to the Act of Congress, in such cases made and provided, fully and at large appears.

And Whereas, on the 25th day of April, in the year of our Lord, one thousand nine hundred and fifty-six, the said cause came on to be heard before the said United States Court of Appeals for the Ninth Circuit, on the said transcript of record, and was duly submitted:

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is reversed and that this cause be, and hereby is remanded to the said District Court for a finding as to whether Wahyou has sustained such a burden of proof on the bases of the evidence presently in the record or any additional evidence the parties may offer with costs in this court in favor of the appellants and against the appellees.

It is further ordered and adjudged by this court that the appellants recover against the appellees for their costs herein expended and have execution therefor.

You, Therefore, Are Hereby Commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Earl Warren, Chief Justice of the United States, the twenty-third day of

July, in the year of our Lord one thousand nine hundred and fifty-six.

(June 8, 1956.)

/s/ PAUL P. O'BRIEN,

Clerk, United States Court of Appeals for the Ninth Circuit.

Costs: Clerk \$25.00. Printing record: \$413.87.
Total \$438.87.

[Endorsed]: Filed August 6, 1956.

In The United States District Court
For The District of Nevada

Civil Action File No. 1029

G. A. MILLER, W. W. LORD, RALPH SMEED,
L. H. STAUS and JACK SMEED, trustees of
JOHN W. SMEED ESTATE,

Plaintiffs,

vs.

ARCHIE CORBARI, otherwise known as A. E.
CORBARI; MARIE CORBARI; SAM WAH-
YOU; DIAMOND-S RANCH CO., a Nevada
Corporation; THOMAS G. LEE; TOY
QUONG; JOE SIN; K. R. NUTTING; YIP
K. TOON; and HERBERT JANG, otherwise
known as HERBERT JONG,

Defendants.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

In the above-entitled matter, both Plaintiffs and

the Defendants, except Defendants Corbari, made Motions for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and pursuant to those Motions the Court did on August 11, 1955, make and file in this case its Opinion and Decision on Motions for Summary Judgment. Thereafter, Plaintiffs appealed said decision to the United States Court of Appeals for the Ninth Circuit, which Court ordered the Judgment reversed and the case remanded to this Court for a finding as to whether the Defendant Sam Wahyou has sustained the burden of proving that the transaction whereby he acquired Defendant Archie Corbari's 310 Shares of Common Capital Stock in Diamond-S Ranch Co., a Nevada Corporation, was fair and involved no misuse of his office. The Defendants Archie Corbari, otherwise known as A. E. Corbari, and Marie Corbari, did not appeal from the Summary Judgment granted against them in favor of Plaintiffs by this Court on August 11, 1955, and that Judgment has become final in favor of Plaintiffs herein and against Defendants Archie Corbari, otherwise known as A. E. Corbari, and Marie Corbari.

The above-entitled matter came on for trial on June 4, 1957, before the Court without a jury, for the purpose of taking evidence upon the issue specified in the Mandate of the United States Court of Appeals for the Ninth Circuit, No. 14902, entered the 23rd day of July, 1956, and filed in this Court on the 6th day of August, 1956. John S. Halley, Esq., and Forrest E. Macomber, Esq., appeared as

Counsel for the above-named Defendants, except Defendants Corbari, and Laurence N. Smith, Esq., Miles N. Pike, Esq., and George A. Greenfield, Esq., appeared on behalf of Pike & McLaughlin; Carver, McClenahan & Greenfield; and Smith & Ewing, as Attorneys for the Plaintiffs herein.

Witnesses were sworn, evidence, both oral and documentary, was introduced, and the matter was thereafter submitted to the Court for Decision. Now, therefore, the Court now makes its Findings of Fact and Conclusions of Law as follows:

Findings of Fact

1. That it is true that Plaintiffs, G. A. Miller, W. W. Lord, Ralph Smeed, L. H. Staus and John H. Smeed are the trustees under the testamentary trust of John W. Smeed, deceased, under his will, duly admitted to probate in the Probate Court of Canyon County, Idaho, and are residents and citizens of the State of Idaho.

2. That it is true that Defendants A. E. Corbari, otherwise known as Archie E. Corbari, and Marie Corbari are husband and wife and are citizens of the State of Nevada; that it is likewise true that the Defendants Sam Wahyou, K. R. Nutting, Thomas G. Lee, Toy Quong, Joe Sin, Yip K. Toon, and Herbert Jang, otherwise known as Herbert Jong, are citizens of California.

3. That it is true that Diamond-S Ranch Co. is a Nevada Corporation organized and existing under the laws of the State of Nevada since the 17th day of December, 1945; that although on September 7,

1950, Diamond-S Ranch Co. filed a Certificate of Election to Dissolve, it elected to rescind the same and filed its Certificate of Revival on December 7, 1951, electing to reinstate said Corporation, and caused said corporation to be renewed and revived as of September 7, 1950, in accordance with Section 93(3), Chapter 177, General Corporation Law of 1925, as amended, of the Statutes of Nevada, and that said Defendant Corporation is and ever since the 17th day of December, 1945, was a bona fide Nevada Corporation.

4. That it is true that the matter of controversy in this suit exceeds, exclusive of interest and costs, the sum of \$3,000.00.

5. That it is true that said defendants, A. E. Corbari and Marie Corbari, on or about December 31, 1948, made and executed and delivered to John W. Smeed, their certain promissory note, in words and figures as follows:

“\$15,041.34. Caldwell, Idaho, December 31st, 1948.

On Demand: or if no demand is made, then on December 31st, 1949 after date, I, we, or either of us, promise to pay to John W. Smeed or order, Fifteen Thousand Forty One and 34/100 Dollars. For value received, negotiable and payable at The First National Bank of Caldwell, Caldwell, Idaho, in Legal Tender of the United States of America, with interest at the rate of five per cent per annum from date, payable annually, and a reasonable attorney's fee in case this note or any part thereof, is collected by an attorney, either with or with-

out suit. If this note is not paid at maturity it shall thereafter bear interest at the rate of Eight per cent per annum until paid, both before and after judgment. All makers and endorsers of this note each hereby expressly waive demand, notice of non-payment and protest, and guarantee the payment of this note at maturity or at any time thereafter.

A. E. Corbari
Marie Corbari''

No.

Due Rt. #1, Box 42,
P. O. Tracy, California

that it is true that said John W. Smeed is now deceased and the Plaintiffs herein, as trustees under his last will and testament, are now the owners and holders of said note.

6. That it is true that plaintiffs herein have employed Smith & Ewing, Carver, McClenahan & Greenfield and Pike and McLaughlin, Attorneys at Law, to collect said note and have become liable to said Attorneys for a reasonable attorney fee.

7. That it is true that neither of the Defendants Archie E. Corbari or Marie Corbari, his wife, has paid said note or any part thereof, save and except that they have paid thereon the sum of \$750.00 on November 22, 1950.

8. That it is true that the said Defendants Archie E. Corbari, otherwise known as A. E. Corbari, and Marie Corbari, his wife, owe unto Plaintiffs on account of said note the sum of \$14,291.34

plus interest at 5% per annum on the sum of \$15,041.34 from December 31, 1948, to December 31, 1949, plus interest on \$15,041.34 at 8% per annum from December 31, 1949, until November 22, 1950, plus interest on \$14,291.34 at 8% per annum from November 22, 1950, until August 11, 1955, and interest thereafter on the sum of \$14,291.34 at 8% per annum, plus a reasonable attorney fee for services rendered to collect said note.

9. That it is true that said Attorneys, Smith & Ewing, Carver, McClenahan & Greenfield and Pike and McLaughlin, rendered services for Plaintiffs and the Court finds that a reasonable attorney fee is the sum of ten (10%) per cent of the amount of principal plus ten (10%) per cent of the amount of interest due thereon up to the date of Judgment herein.

10. That it is true that the Defendant A. E. Corbari was the owner of 310 shares of the Common Capital Stock of the Defendant Diamond-S Ranch Co. on and prior to July 10, 1950 (subject to the encumbrances hereinafter mentioned), out of a total of 1572½ shares outstanding as of that date, and the Defendants Sam Wahyou, Thomas G. Lee, Toy Quong, Joe Sin, K. R. Nutting, Yip K. Toon and Herbert Jang owned the balance of the shares.

11. That it is true that on January 4, 1949, the Defendant Archie E. Corbari made and executed to the Bank of America N. T. & S. A., Hunter Square Branch, Stockton, California, a general assignment and pledged his 310 shares of Diamond-S Ranch Co. stock to the said Bank to secure certain

indebtedness for which he was wholly or jointly liable; that it is true that on September 18, 1950, said Defendant Corbari made and executed to said Bank a second pledge agreement securing a promissory note to said Bank dated July 10, 1950, in the amount of \$6,000.00, and also to secure his note to one D. W. Zignego in the sum of \$12,500.00 on which there was a balance due of \$10,000.00 plus interest, and to secure an indebtedness due one Forrest E. Macomber in the amount of \$12,000.00 plus interest, and that the pledge agreement of September 18, 1950, was to secure the indebtedness to the said Bank, Zignego and Macomber in the order named.

12. That it is true that on or about October 17, 1950, the said Bank of America N. T. & S. A., Hunter Square Branch, at Stockton, California, assigned all of its right, title and interest in and to said promissory note owing by said Defendant Corbari, together with the security, consisting of the pledge of 310 Shares of the Common Capital Stock of Diamond-S Ranch Co. owned by said Defendant Corbari, unto Sam Wahyou, who paid said Bank the sum of \$5,500.00 therefor, which sum of \$5,500.00 consisted of \$5,000.00 in principal and \$500.00 in interest owing by Defendant Corbari on the promissory note of July 10, 1950, and which indebtedness was all long past due; that it is true that said Defendant Wahyou had purchased said note and pledge from said Bank after said Bank had made many demands upon Defendant Corbari for the payment thereof and had threatened to

foreclose its pledge on said 310 Shares of Stock which secured payment of the note.

13. That it is true that on or about the 22nd day of February, 1950, Defendant A. E. Corbari agreed with Plaintiffs to secure the promissory note owing by Defendants Archie E. Corbari and Marie Corbari, his wife, to Plaintiffs' predecessor in interest, and on or about October 31, 1950, executed a writing to one W. W. Lord as trustee, which writing is in words and figures as follows:

"Assignment

"Know All Men By These Presents, that Whereas, I, A. E. Corbari, am indebted on a certain note given to John W. Smeed, dated December 31, 1948, due December 31, 1949, in the principal amount of \$15,041.34, plus interest at the rate of five per cent per annum, together with costs incurred in connection therewith in the sum of \$775.00, and the sum of \$2.06 interest per day until the payment of said indebtedness;

Now, Therefore, in consideration of the premises, and to secure the payment of said indebtedness, I do hereby sell, assign, transfer and set over unto W. W. Lord, as Trustee, all my right, title and interest in and to all of my partnership interest in the assets of a certain partnership formed by reason of the dissolution of Diamond-S Ranch Co., a Nevada corporation, and in and to any profits arising from the operation of said partnership. I further state that I was the owner of 310 shares of stock in said Diamond-S Ranch Co., and

that the total outstanding shares of stock in said Company was 1,572½ shares, and that my interest in the partnership and the assets of the partnership formed in connection with the dissolution of said Company, is in the same proportion as was my holding of stock in the total outstanding issue thereof. And I hereby grant unto said W. W. Lord, as Trustee, full power, in my name or otherwise, to hold and operate said partnership interest, and the assets thereof, in the same manner as I could personally do, until the payment in full of said indebtedness and any other costs which may be incurred in connection with any transaction regarding collection of said indebtedness.

This assignment is made upon the express condition that if I shall pay or cause to be paid to the said W. W. Lord, as trustee, his successor or assigns, the above-recited indebtedness on or before April 25, 1951, then this assignment shall be void and of no effect.

In case the said W. W. Lord, as trustee, his successors or assigns, shall collect the moneys due on the said indebtedness he or they shall, after retaining the full amount of the above indebtedness, and the reasonable costs and expenses of collection, pay over the surplus, if any, to me, or my successors, administrators or assigns.

In case of non-payment of said indebtedness on or before April 25, 1951, I hereby appoint and constitute said W. W. Lord, as trustee, his successors or assigns, my attorney, irrevocable, with power of substitution, to take possession of, and

if he so desires, to sell at any time after said payment is due, with or without notice, at the option of said Trustee, the whole or any part of said security either at public or private sale, at his discretion, and the proceeds thereof to be applied on the payment of said indebtedness, and any surplus after payment of said indebtedness and expenses to be subject to my order. In like manner I agree to pay on demand to said W. W. Lord, as trustee, his successors or assigns, whatever deficit may result after applying the net proceeds of such sale to the payment of said indebtedness.

And I, Marie Corbari, the wife of said A. E. Corbari, hereby join in this assignment and consent thereto, to the same extent as though named in the body of said assignment.

In Witness Whereof, We have hereunto set our hands and seals, this 31st day of October, 1950.

[Seal] A. E. CORBARI

A. E. Corbari

[Seal] MARIE CORBARI

Marie Corbari''

and that said writing was recorded March 27, 1951, in the Office of the County Recorder of Humboldt County, Nevada.

14. That at the time said document of October 31, 1950, was executed and delivered, and for some months prior thereto, Plaintiffs had notice of and knowledge that Defendant Archie E. Corbari's 310 shares of the Common Capital Stock in Diamond-S Ranch Co. had been pledged to the Bank of

America N. T. & S. A., Hunter Square Branch, Stockton, California, in order to secure the Corbari's indebtedness to said Bank.

15. That it is true that after the Defendant Sam Wahyou purchased the Defendant Archie Corbari's note from the said Bank of America and the Defendant Archie Corbari failed to pay said note unto the Defendant Sam Wahyou, and by reason of the non-payment of said note to the Defendant Sam Wahyou, the said Defendant Sam Wahyou caused said stock to be sold under the terms of said pledge agreements and pursuant to the laws of the State of California relating to sales of pledged property, and on May 21, 1951, said 310 shares of the Common Capital Stock of Diamond-S Ranch Co., the subject matter of said pledge, were sold at public auction at the Main St. Entrance to the County Courthouse in the City of Stockton, County of San Joaquin, State of California, in accordance with the laws of the State of California, and said 310 shares were purchased by Gordon J. Aulik as agent for Sam Wahyou and in the name of Sam Wahyou for the sum of \$5,500.00.

16. That it is true that the said sale was fairly made in accordance with the laws of the State of California relating to the sale of pledged property and fairly conducted, and the Defendant Sam Wahyou has sustained the burden of proving and has proven that there was no fraud or misrepresentation or other unfair means involved in the purchase of said shares by the Defendant Sam Wahyou, and

it is true that the transaction whereby the said Defendant Sam Wahyou acquired the Defendant Archie E. Corbari's stock was fair and that the reasonable value of the shares of stock at the time of the purchase thereof by Defendant Sam Wahyou at said sale on May 21, 1951, was nil and that the said shares after the date of purchase and up to the time of the trial of this action were of no value whatsoever.

17. That it is true that insofar as the value of said stock was concerned as of the date of its sale at public auction and its purchase by Defendant Sam Wahyou on May 21, 1951, there were no facts within the knowledge of the said Defendant Sam Wahyou that were not equally available to Plaintiffs or the Defendant Archie E. Corbari.

From the foregoing facts, the Court concludes:

Conclusions of Law

1. That Plaintiffs are entitled to the judgment against the Defendants Archie E. Corbari, otherwise known as A. E. Corbari, and Marie Corbari, his wife, as heretofore determined by this Court in the Order granting Summary Judgment made and filed herein on August 11, 1955.

2. That Plaintiffs are entitled to take nothing against the Defendants Sam Wahyou, Diamond-S Ranch Co., a Nevada Corporation, Thomas G. Lee, Toy Quong, Joe Sin, K. R. Nutting, Yip K. Toon and Herbert Jang, otherwise known as Herbert

Jong, and that the said Defendants are entitled to their costs of court herein incurred.

Let judgment be entered accordingly.

Dated: Sept. 27, 1957.

/s/ JOHN R. ROSS,
U. S. District Judge.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Sept. 27, 1957.

In The United States District Court
For The District of Nevada

Civil Action File No. 1029

G. A. MILLER, W. W. LORD, RALPH SMEED,
L. H. STAUS and JACK SMEED, trustees
of JOHN W. SMEED ESTATE,
Plaintiffs,

vs.

ARCHIE CORBARI, otherwise known as A.E.
CORBARI; MARIE CORBARI; SAM WAH-
YOU; DIAMOND-S RANCH CO., a Nevada
Corporation; THOMAS G. LEE; TOY
QUONG; JOE SIN; K. R. NUTTING; YIP
K. TOON; and HERBERT JANG, otherwise
known as HERBERT JONG,

Defendants.

JUDGMENT

In the above-entitled matter, both Plaintiffs and Defendants, except Defendants Corbari, made Mo-

tions for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and pursuant to those Motions the Court did on August 11, 1955, make and file in this case its Opinion and Decision on Motions for Summary Judgment. Thereafter, the Plaintiffs appealed said decision to the United States Court of Appeals for the Ninth Circuit, which Court ordered the Judgment reversed and the case remanded to this Court for a finding as to whether the Defendant Sam Wahyou has sustained the burden of proving that the transaction whereby he acquired the Defendant Archie Corbari's 310 Shares of Common Capital Stock in Diamond-S Ranch Co., a Nevada Corporation, was fair and involved no misuse of his office. The Defendants Archie Corbari, otherwise known as A. E. Corbari, and Marie Corbari, did not appeal from the Summary Judgment granted against them in favor of Plaintiffs by this Court on August 11, 1955, and that Judgment has become final in favor of Plaintiffs herein and against Defendants Archie Corbari and Marie Corbari.

The above-entitled matter came on for trial on June 4, 1957, before the Court without a jury, for the purpose of taking evidence upon the issue specified in the Mandate of the United States Court of Appeals for the Ninth Circuit, No. 14902, entered the 23rd day of July, 1956, and filed in this Court on the 6th day of August, 1956. John S. Halley, Esq., and Forrest E. Macomber, Esq., appeared as Counsel for the above-named Defendants, except the Defendants Corbari, and Laurence N. Smith,

Esq., Miles N. Pike, Esq., and George A. Greenfield, Esq., appeared on behalf of Pike & McLaughlin; Carver, McClenahan & Greenfield; and Smith & Ewing, as Attorneys for the Plaintiffs herein.

Witnesses were sworn, evidence, both oral and documentary, was introduced, and the matter was thereafter submitted to the Court for decision. And the Court being fully advised in the premises and having heretofore made and entered herein its Findings of Fact and Conclusions of Law; now, therefore,

It Is Hereby Ordered, Adjudged and Decreed as follows:

1. That Plaintiffs herein have and recover of and from the Defendants Archie E. Corbari, otherwise known as A. E. Corbari, and Marie Corbari, his wife, as heretofore determined by this Court in the Order granting Summary Judgment made and filed herein on August 11, 1955.

2. That Plaintiffs take nothing against the Defendants Sam Wahyou, Diamond-S Ranch Co., a Nevada Corporation, Thomas G. Lee, Toy Quong, Joe Sin, K. R. Nutting, Yip K. Toon and Herbert Jang, otherwise known as Herbert Jong, and that the said Defendants have and recover of and from the Plaintiffs herein their costs incurred herein, taxed at the sum of \$227.88.

Dated: Sept. 27th, 1957.

/s/ JOHN R. ROSS,

U. S. District Judge.

[Endorsed]: Filed Sept. 27, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given, that G. A. Miller, W. W. Lord, Ralph Smeed, L. H. Staus and Jack Smeed, Trustees of John W. Smeed Estate, hereby appeal to the United States Court of Appeals for the Ninth Circuit from that portion of the Judgment which was made and entered by the United States District Court for the District of Nevada, on the 27th day of September, 1957, granting judgment for the defendants on Counts 2, 3 and 4 of the Amended Complaint both as to law and facts and the whole thereof.

Dated: October 11, 1957.

PIKE & McLAUGHLIN,
SMITH & EWING,
CARVER, McCLENAHAN &
GREENFIELD,

/s/ By LAURENCE N. SMITH,
Attorneys for Plaintiffs.

Acknowledgment of Service Attached.

[Endorsed]: Filed Oct. 16, 1957.

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANTS INTEND TO RELY ON APPEAL

Pursuant to Rule 17 (6) of the Rules of the

above entitled Court, appellants do hereby make the following statement of points upon which they intend to rely on appeal:

1. The Court erred in making and entering its Finding of Fact No. 14, such Finding of Fact being against the weight of evidence and in conflict with the admitted facts and is clearly erroneous.

2. The Court erred in making and entering its Finding of Fact No. 16 in that each statement of fact contained therein is erroneous and contrary to the evidence and that the evidence clearly showed the Corbari stock to have substantial value.

3. The Court erred in making and entering its Finding of Fact No. 17 in that each statement of fact therein contained is erroneous and contrary to the evidence and that the evidence clearly showed the Corbari stock to have substantial value.

4. The Court erred in making its Conclusions of Law No. 2.

5. The Court erred in entering the Judgment of September 27, 1957.

6. The Court erred in granting Judgment to the defendants on Counts 2, 3 and 4 of the Amended Complaint for the reason that the burden of proof being on the defendants was not sustained.

7. The Court erred in failing to grant plaintiffs' Motion for Judgment at the close of defendants' case for the reason that the defendants failed to

sustain the burden of proof as to the bona fides of the transaction.

8. The Court erred in failing to find that the transaction on the part of Wahyou is one which would enrich the said Wahyou.

9. The Court erred in failing to find that the sale of the Corbari stock to Wahyou was void because Wahyou had made misuse of his office as Trustee.

10. The Court erred in failing to find that the Corbari stock was worth substantially more than the price paid by Wahyou and that as a result Wahyou unjustly enriched himself.

11. The Court erred in failing to find that Wahyou at the time he made the purchase of the Corbari stock intended and believed that he was purchasing stock of a substantially greater value than the price paid.

12. That the Findings of Fact and Conclusions of Law are contrary to the weight of evidence and are not supported by competent evidence.

PIKE & McLAUGHLIN,
SMITH & EWING,
CARVER, McCLENAHAN &
GREENFIELD,

/s/ By MILES N. PIKE,
Attorneys for Plaintiffs.

Acknowledgment of Service Attached.

[Endorsed]: Filed Oct. 17, 1957.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

Pursuant to Rule 75 (a) of the Federal Rules of Civil Procedure, the plaintiffs-appellants hereby designate for inclusion in the record on appeal to the United States Court of Appeals for the Ninth Circuit, taken by notice of appeal filed October 16, 1957, the following portions of the record, proceedings and evidence in this action:

1. The Complaint.
2. The answer of the defendant, Diamond-S Ranch Co. to the complaint.
3. The answer of the defendants, A. E. Corbari and Marie Corbari, to the complaint.
4. Plaintiffs' motion for leave to file first amended complaint.
5. Order granting plaintiffs' motion for leave to file first amended complaint.
6. First amended complaint.
7. Answer of defendant, Diamond-S Ranch Co. to first amended complaint.
8. Answer of the defendants A. E. Corbari and Marie Corbari to first amended complaint.
9. Answer of the defendants, Forrest E. Macomber, Thomas G. Lee, Toy Quong, Joe Sin, Yip K. Toon, Herbert Jang and D. W. Zignego to first amended complaint.
10. Plaintiffs' request for admissions on the part of the defendants, Diamond-S Ranch Co.

11. Verified response to request for admissions on the part of the defendant, Diamond-S Ranch Co.

12. Defendants' motion to quash service of summons, motion to dismiss and motion to strike.

13. Order denying defendants' motion to quash service, denying motion to dismiss, and granting in part and denying in part motion to strike.

14. Stipulation by and between the parties as to exhibits.

15. Factual Statement of the defendant, Diamond-S Ranch Co.

16. Deposition of Wayland W. Lord.

17. Deposition of Archie E. Corbari.

18. Deposition of Sam Wahyou and Forrest E. Macomber.

19. Pre-trial order.

20. Plaintiffs' motion for summary judgment.

21. Defendants' motion for summary judgment.

22. Findings of Fact and Conclusions of Law.

23. Judgment denying plaintiffs' motion for summary judgment and granting defendants' motion for summary judgment.

24. Notice of Appeal.

25. Statement of Points on Appeal.

26. Amended Designation of Contents of Record on Appeal.

27. On return from the Appellate Court the 18 exhibits used in the appeal in Case No. 14902; the deposition of Archie Corbari, dated October 17, 1952; the deposition of W. W. Lord, dated October 17, 1952; and the deposition of Sam Wahyou, dated October 18, 1952.

The foregoing 27 items not to be printed they appearing in the transcript of record in Case No. 14902, United States Court of Appeals for the Ninth Circuit.

Additional contents to be printed:

28. Transcript of testimony and proceedings taken and had at the hearing on June 3rd and 4th, 1957.

29. Plaintiffs' Exhibits Nos. 1, 2, 3, 4 and 5 as follows:

1. The deposition of Robert Wisecarver;

2. Map of the Real Property; (Not to be Printed).

3. Appraisal made by Idaho Land and Map Service;

4. Appraisal made by Jack Utter;

5. Deposition of Sam Wahyou dated October 20, 1956.

30. Defendants' Exhibits lettered A to G, both inclusive, as follows:

A. Grazing Fee Receipt;

B. Balance Sheet of Diamond-S Ranch Co. as of 12/31/56;

C. Adjusted Balance Sheet;

D. Statement of Capital Expenditures;

E. Analysis of Capital Expenditures;

F. Letter of Grazing Service;

G. Wahyou Financial Statement.

31. Mandate to the Trial Court from the Circuit Court of Appeals.

32. The Findings of Fact and Conclusions of Law and Judgment dated September 27, 1957.

33. Notice of Appeal.
34. Statement of Points on Appeal.
35. This designation.

PIKE & McLAUGHLIN,
SMITH & EWING,
CARVER, McCLENAHAN &
GREENFIELD,

/s/ By MILES N. PIKE,
Attorneys for Plaintiffs.

Acknowledgment of Service Attached.

[Endorsed]: Filed Oct. 17, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Nevada—ss.

I, Oliver F. Pratt, Clerk of the United States District Court for the District of Nevada, do hereby certify that the accompanying documents and exhibits, listed in the attached index, are the originals filed in this court, or true and correct copies of orders entered on the minutes or dockets of this court, in the above-entitled case, and that they constitute the record on appeal herein as designated by the parties.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 7th day of November, 1957.

[Seal] /s/ OLIVER F. PRATT,
Clerk.

In The United States District Court,
For The District of Nevada

No. 1029

G. A. MILLER, et al., Plaintiffs,

vs.

ARCHIE CORBARI, et al., Defendants.

TRANSCRIPT OF TESTIMONY

June 4, 1957

Carson City, Nevada

Before: Hon. John R. Ross, Judge.

Trial

Be It Remembered, That the above-entitled matter came on for trial before the Court, sitting without a jury, on Tuesday, the 4th of June, 1957, at Carson City, Nevada.

Appearances: Laurence N. Smith, Esq., Miles N. Pike, Esq., George Greenfield, Esq., Attorneys for Plaintiff. Forrest E. Macomber, Esq., John S. Halley, Esq., Attorneys for Defendants Sam Wahyou and Diamond-S Ranch Company.

The following proceedings were had:

KENNETH R. NUTTING

a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Macomber): Your name is Kenneth R. Nutting? A. That is correct.

(Testimony of Kenneth R. Nutting.)

Q. Where do you live? [1*]

A. Salinas, California.

Q. Are you a stockholder in Diamond-S Ranch?

A. I am.

Q. Are you an officer and director?

A. I am.

Q. What office do you hold?

A. Vice-president.

Q. And a director? A. And a director.

Q. Had you acquired some stock, 140 shares of stock, in the Diamond-S Ranch on or about the month of June, 1950? A. I did.

Q. From John Fox? A. John Fox.

Q. What was the consideration for that stock?

A. Well, that stock was then owned by K. R. Nutting Company, of which John Fox was a partner.

Q. So you had already owned that?

A. Yes.

Q. It was in Mr. Fox's name but your stock?

A. That is correct.

Q. On or about June 15th of 1950 did you acquire an additional 489 shares of stock in the Diamond-S Ranch? A. I did.

Q. From whom? [2] A. Sam Wahyou.

Q. What was the consideration for that?

A. I paid Sam Wahyou twenty thousand dollars for 489 shares, which supposedly represented thirty-two per cent of the stock then outstanding,

* Page numbers appearing at bottom of page of Reporter's Original Transcript of Record.

(Testimony of Kenneth R. Nutting.)

which with the 140 shares I had gave me forty per cent interest, with the understanding that the twenty thousand dollars was to be used——

Mr. Smith: Just a moment. We object to any enlargement of the question beyond the immediate question.

Q. Was the sale conditional or unconditional?

A. It was a conditional sale.

Q. And under what conditions?

A. I paid twenty thousand dollars cash and it was to use that twenty thousand dollars to re-invest in the Ranch as operating capital.

Q. Did you thereafter acquire any other shares in the ranch? A. Acquire any others?

Q. Yes.

A. In August, 1953, I gave to Mr.——

Q. You didn't acquire any?

A. I didn't acquire any further at that time.

Q. Did you sell any stock in the Diamond-S Ranch?

A. I did not sell any; I gave some.

Mr. Smith: Just a minute—the date is important as to that. Fix the date, please. [3]

A. August, 1953.

Q. On or about August 30, 1953——

Mr. Smith: Just a minute. Your Honor, I believe at the pre-trial there was a stipulation, under which the cut-off date was the date of sale of stock, which was May 21, 1951. Any sales after May 21, 1951 are too remote and would have no bearing upon the matter before the Court, and for the

(Testimony of Kenneth R. Nutting.)

further reason that there could have been changes in the condition of the ranch between the date of 1951 and 1953, which would affect the stock one way or the other.

Mr. Macomber: We will show what those changes are, your Honor.

The Court: I did think the cut-off date was the date of the sale, as counsel pointed out, and the objection on that point is good.

Mr. Macomber: This would have no bearing on what the stock was worth; if you take one particular date and there was no transaction on or about that date, you have nothing to go on, and if you can show as closely as you can what sales there were to that date, it would have some bearing there, go to the weight of the testimony.

The Court: For that purpose it may be admitted.

Q. Did you dispose of any of your stock in the Diamond-S Ranch by August 30, 1953?

A. Yes, in August, 1953, I gave to Hogue one hundred five [4] shares, for which there was no consideration. This was done to equalize the stock between Mr. Wahyou and Mr. Hogue and myself, with everybody winding up with one-third.

Q. So since August 30, 1953, all of you, that is, Wahyou, Hogue and yourself, each owned one-third of the stock? A. That is correct.

Q. And prior to that time, between June of 1950 and August of 1953, you owned forty per cent of that stock? A. That is correct.

(Testimony of Kenneth R. Nutting.)

Q. Now would you tell the Court the condition of the Diamond-S Ranch in 1951?

Mr. Smith: Just one minute—it would be necessary he qualify himself to show he is familiar with the books and records of the corporation.

Mr. Macomber: I am talking about physical properties.

Q. You have been to the Diamond-S Ranch?

A. I was on the ranch, yes. You are speaking now of 1950?

Q. Well, 1951. A. 1951—at that time——

Mr. Smith: What time in 1951, please?

A. The spring. The ranch was in rather delapidated condition, so far as ditches and irrigation possibilities and Mr. Wahyou and myself attempted to rehabilitate them, as far as operating the ranch at that time.

Q. What crops were grown on the ranch at that time? [5]

A. At that time there were no crops, except feed in the meadows.

Q. Will you describe that a little bit more? Describe the ranch to the Court.

A. Well, the ranch had been neglected, it looked as though it had been neglected for quite some time. When I went onto the ranch with Mr. Wahyou I thought it could be built up and made into a fairly good cattle ranch. At that time it required considerable amount of work. As I mentioned, the irrigation system was very little use, had to be excavated, and had not been watered for

(Testimony of Kenneth R. Nutting.)

some time. I can say it was in rather poor condition.

Q. What, in your opinion, was the value of the Diamond-S Ranch in 1951?

Mr. Smith: Your Honor, I object to that on the ground that he has not been proven competent to give an expert appraisal on the property, having given no testimony at all of his knowledge of ranch values in the vicinity, nor has made no other qualification as an expert.

Mr. Macomber: He has testified he was vice-president of the company and a director.

The Court: Well, as the owner of stock, I guess he does have a right to give his opinion.

Mr. Smith: As of what time?

The Court: Any owner may testify without showing background. Objection overruled. [6]

A. I would estimate the ranch about one hundred fifty thousand dollars. They had cattle, they had grazing rights for over a thousand head. There is a certain rule of thumb of one hundred fifty dollars a head of that grazing rights, that is, the value of the property is worth approximately one hundred fifty dollars a head.

Q. Do you know what in 1951 the actual—

The Court: Pardon me—then your conclusion as to the value of one hundred fifty thousand dollars is based upon this rule of thumb which you speak of, to the effect that a livestock set-up is roughly valued at one hundred fifty dollars per head of cattle?

(Testimony of Kenneth R. Nutting.)

A. That is true.

The Court: And that value then of one hundred fifty thousand dollars is only a formula?

A. That is correct.

Q. With respect to feeder rights, or Taylor grazing rights, do you know what rights the Diamond-S Ranch Company had in 1951, what Taylor grazing rights they had?

A. You mean the Diamond-S itself, or including leased land that they had?

Q. Have the rights been approximately the same from 1951 to date? A. I think so.

Mr. Macomber: May I have this marked for identification, [7] receipt of the United States Department, Bureau of Land Management, with respect to Taylor grazing rights for the Diamond-S Ranch.

Mr. Pike: This is for the grazing season 1957, that is correct, is it not?

Mr. Macomber: That is correct.

The Court: It may be marked for identification Defendants' Exhibit A.

Q. Mr. Nutting, I show you Defendants' Exhibit A for identification. Does that refresh your recollection as to what the Taylor grazing rights were?

Mr. Smith: Just a moment.

Mr. Macomber: I haven't finished my question.

A. Yes. I see——

Mr. Smith: Just a moment.

The Court: Where are we?

Mr. Smith: Mr. Macomber said he had not fin-

(Testimony of Kenneth R. Nutting.)

ished his question, so I withdraw the objection I started to make until the question is asked.

The Court: Restate the question.

Q. Does that refresh your recollection as to what the Taylor grazing rights are at this time?

A. Yes, it does.

Mr. Smith: Just a minute. Your Honor, may I ask a question on voir dire? [8]

The Court: You may.

Mr. Smith: (On voir dire) Did you prepare that memorandum yourself? A. I did not.

Q. And it came from the Taylor Grazing—you have not had it in your possession?

A. This is the first time I saw it.

Q. And it is dated for the grazing year 1957, is it not? A. Yes.

Mr. Smith: Your Honor, I object on the grounds it is not a memorandum he has prepared by himself from which he could recollect his memory on, and it is too remote, dated for the year 1957.

The Court: Objection sustained.

Mr. Macomber: At this time, if the Court please, I offer in evidence the receipt of the United States Department of the Interior, Bureau of Land Management, showing the extent of the Taylor grazing rights for the Diamond-S Ranch for the year 1957, as Defendants' Exhibit A. The witness has already testified they were approximately the same from 1951 to date.

Mr. Smith: Your Honor, there has been no such testimony on the part of the witness at all.

(Testimony of Kenneth R. Nutting.)

Mr. Halley: I think the witness has testified the Taylor grazing right is the same from 1951 to date.

Mr. Macomber: May we have the record on that, please. [9]

The Court: Do you make objection on that basis?

Mr. Smith: Yes, I do.

The Court: Objection sustained. I do not see why you can not obtain from the Grazing Service exactly what the rights were at a certain date.

Mr. Macomber: We have to bring a witness from Winnemucca to do that.

Mr. Greenfield: Your Honor, I think we can probably arrange that. The records are in Winnemucca and whatever the rights were in 1951, I am sure we can agree to.

Mr. Halley: I think we can dispose of this matter with counsel during the recess and work out a stipulation.

Mr. Greenfield: As a matter of fact, we have copies of the Bureau of Grazing office records for 1951 in our own possession and I am sure we can agree on the rights.

The Court: Of course, there will be no question as to the authenticity of these records, just a case of getting together, so there is no reason why you can't stipulate.

Mr. Macomber: That is right.

Q. Mr. Nutting, do you know what the Taylor Grazing rights, as distinguished from the leased land, were in 1951? A. Again?

(Testimony of Kenneth R. Nutting.)

Q. Do you know what the Taylor Grazing rights alone were that were attributable to Diamond-S Ranch Company in 1951, approximately? [10]

A. Do you mean the owned land of the Diamond-S?

Q. No, I mean the Taylor Grazing rights, that is, the government land that was used in connection with the Diamond-S Ranch Company for grazing of cattle?

A. Well, I don't know exactly; approximately three hundred head.

Q. For what period of time?

A. Five months.

Q. And do you know how much——

The Court: You are speaking now of Taylor Grazing rights. In other words, between the fee ownership and rights you acquired in leasing the lands, the ranch does have a total of approximately three hundred head?

A. The ranch itself had approximately three hundred and the balance was on leased ground.

The Court: The balance of one thousand?

A. Balance of a thousand.

Q. Do I understand, then, it is your testimony that the animal unit carrying capacity of the ranch was one thousand head?

Mr. Greenfield: If we are going to strike out from the record all ranch rights, I think this line of questioning is objectionable.

Mr. Macomber: That is right. I withdraw the question. That's all. [11]

(Testimony of Kenneth R. Nutting.)

Cross Examination

Q. (By Mr. Greenfield): Mr. Nutting, you have testified, in placing your valuation on this property, that by a rule of thumb one hundred fifty dollars a head is approximately the method you employed to arrive at your valuation of one hundred fifty thousand dollars? A. That is correct.

Q. Then you were basing your valuation on approximately a thousand head right that you testified to, is that right? A. That's right.

Q. Now, if, as a matter of fact, the ranch carried a sixteen hundred head right, then your valuation of the ranch would be in the neighborhood of two hundred forty thousand dollars, wouldn't it?

A. Based on that theory, yes.

The Court: By the same token, if subtracted from the thousand head permit, the number of head that applied to leased land, you would reduce the value?

Mr. Greenfield: I presume so, if those are the facts.

Q. The leased lands that are involved here are the property of the Diamond-S Ranch Corporation, are they not?

A. One lease, the Milem lease, is the property of the Diamond-S Ranch. The other lease from the Southern Pacific Company is not the property of the Diamond-S Ranch, but my property, which I turned over to the Diamond-S Ranch. [12]

Q. You turned it over to them?

(Testimony of Kenneth R. Nutting.)

A. The lease is in my name. It is, for all practical purposes, a part of the ranch.

Q. And part of the assets of the corporation, for all practical purposes?

A. Yes. The lease is still in my name.

Q. If you were selling the ranch, you would include that in the inducement?

A. That is correct.

Q. And when you gave us your valuation of the ranch, you were including the Southern Pacific lease as part of the assets? A. Yes.

Mr. Greenfield: That is all.

Redirect Examination

Q. (By Mr. Macomber): What is the term of the Milem lease, the Southern Pacific lease?

A. Yearly.

Q. You don't know about the Milem lease?

A. I don't know about the Milem.

Mr. Macomber: That's all.

Recross Examination

Q. (By Mr. Greenfield): In connection with the Southern Pacific lease, which you say is a yearly proposition, of course, since the land involved is contiguous with your deeded land, you have a priority in the right to lease it? [13]

A. Yes.

Q. And there is no question but what you can lease every year as long as you wish?

A. I think there is no question.

(Testimony of Kenneth R. Nutting.)

Q. And nobody else can come in ahead of you?

A. That is correct.

The Court: That is, you can lease every year if the Southern Pacific wants to lease it?

A. There is no definite commitment.

The Court: Just as a matter of convenience, you seem to be in a position to buy the lease from the Southern Pacific. On the other hand, if the Southern Pacific does not want to lease it, they do not have to.

Q. (By Mr. Macomber): As a matter of fact, while you owned stock in the ranch, the Southern Pacific did sell this property right along, didn't they?

Mr. Greenfield: I beg your pardon, I haven't finished.

Q. (By Mr. Greenfield): Mr. Nutting, returning again to the Southern Pacific leases, those are alternating sections, aren't they? A. Yes.

Q. So that, as a practical matter, it would be quite hard to find any one else to find the use for it you would have?

A. Those are interspersed with the government land. [14]

Q. Interspersed with federal range that you use for ranging cattle on? A. Yes.

Redirect Examination

Q. (By Mr. Macomber): Do you know whether the Southern Pacific has sold some of this land to Milem?

(Testimony of Kenneth R. Nutting.)

A. They did. Milem bought his land from the Southern Pacific.

Mr. Greenfield: That's all.

The Court: I presume some place along the line we will have the term of the Milem lease?

Mr. Macomber: Yes.

FRANK H. HOGUE

a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Macomber): Your name is Frank H. Hogue? A. That is right.

Q. Where do you live, Mr. Hogue?

A. Yuma, Arizona.

Q. Are you a stockholder in the Diamond-S Ranch Company? A. Yes, I am.

Q. Are you likewise a director?

A. That is right.

Q. What percentage of the shares do you own at the present time? A. One-third.

Q. On or about August 30, 1953, did you acquire some shares? [15] A. Yes.

Q. And from whom did you acquire them?

A. Sam Wahyou.

Q. How many shares?

A. Probably around five hundred, I think.

Q. Did you acquire any shares from Mr. Nutting?

A. Yes, I acquired some one hundred four shares.

(Testimony of Frank H. Hogue.)

Q. What was the consideration for them?

Mr. Greenfield: We object to the question on the ground it is irrelevant and immaterial, in that was a transaction taking place some two years after the transaction that we are concerned with and in issue here and as an appropriate value it is too remote in time to have any value or materiality in this case.

The Court: 1953?

Mr. Macomber: Same date. It has already been testified to.

The Court: Objection overruled.

Q. Will you answer that question? What did you pay Mr. Nutting for the one hundred four shares? A. I didn't pay Nutting anything.

Q. What did you pay Mr. Wahyou?

A. I paid Wahyou thirty-five thousand dollars for one-third interest.

Q. And was that sale conditional or unconditional? [16] A. It was conditional.

Q. What were the conditions, if any?

A. The conditions were that the money should go into financing the ranch, further financing.

Mr. Macomber: That's all.

Cross Examination

Q. (By Mr. Greenfield): Mr. Hogue, how many shares of stock did Mr. Wahyou transfer to you?

A. Something like five hundred. I haven't the exact number, five hundred twenty or——

Q. I might ask you this, Mr. Hogue—were you

(Testimony of Frank H. Hogue.)

familiar with the financial condition of the corporation at the time you purchased this stock of Mr. existed in 1951? A. No.

Q. Were you familiar with the condition as it existed in 1951 A. No.

Q. Would you tell the Court whether or not the financial condition of the ranch at the time you bought from Mr. Wahyou was better or worse than it was in 1951?

A. I do not know what it was in 1951.

Q. It may have been considerably better in 1951, for all you know? A. That is true.

Mr. Greenfield: I think that is all.

Mr. Macomber: That is all. [17]

The Court: Mr. Hogue, you said that you paid Mr. Wahyou thirty-five thousand dollars for one-third interest?

A. That is correct.

The Court: What did you mean by a one-third interest, a one-third interest in the entire outstanding stock, so you became one-third owner of the corporation?

A. That is correct.

JOHN K. BUXTON

a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Macomber): Your name is John Kenneth Buxton? A. That's right.

(Testimony of John K. Buxton.)

Q. And where do you live, Mr. Buxton?

A. Stockton, California.

Q. What is your business or occupation?

A. Certified public accountant.

Q. How long have you been a certified public accountant? A. Since 1950.

Q. What experience have you had in that occupation prior to this time?

A. Some fifteen years.

Q. And you are the accountant for the Diamond-S Ranch? A. I am. [18]

Q. How long have you been accountant for the Diamond-S Ranch?

A. Since approximately the first of this year.

Q. And have you prepared a financial statement of the Diamond-S Ranch and comparative balance sheet for the years 1950 through 1956?

A. I did.

Q. From the books of the corporation?

A. From the books of the corporation.

Q. And you have some copies of that with you?

A. Yes, I do.

Q. Would you give them to me please?

The Court: Comparative balance sheet marked Defendant's B for identification.

Q. Mr. Buxton, I hand you defendant's Exhibit B for identification and ask you if that is the comparative balance sheet that you prepared?

A. Yes, it is.

Q. Is it a true reflection of the data contained in the books of the corporation? A. Yes.

(Testimony of John K. Buxton.)

Mr. Smith: May the answer be stricken for the purpose of making an objection?

The Court: It may be.

Mr. Smith: I object to the comparative balance sheet which is introduced, page 2 thereof being an adjusted balance [19] sheet of December 31, 1956, and page 2 in addition even contains the year 1956, on the ground that this is five years after the cut-off date. I object to the comparative balance sheet which covers the years 1950 to 1956 on the ground proper basis for that has not been laid in any way. He is simply asking if he had prepared a balance sheet and he said he had. What he prepared the balance sheet from, would have to be testified to and what he knows.

The Court: You object to that on the ground of lack of foundation?

Mr. Smith: Lack of foundation as to comparative balance sheet of five years because they are too remote.

The Court: We might get this cleared. Go back to the old bromide that the Court supposedly, at least, has some ability to evaluate testimony.

Mr. Smith: Yes, your Honor.

The Court: And consider the matter of weight, the remoteness. We have a little fear of putting these things before a jury. Now I gather that perhaps all of you are going to make offers that are going to be a little remote from the year 1950 cut-off. I can't see how the Court can get a fair picture of the 1951 situation without having a little

(Testimony of John K. Buxton.)

[20] extension of time on one or the other in that period and I am inclined in the meantime not to rule too strictly on the grounds of remoteness, but I can assure you that the factual situation of recent years are not going to come into the Court's thinking when it works out any determination of the case. The Court is familiar with the economic situation that has prevailed in the ranching and livestock industry and in view of that I think what we are trying to get in now will perhaps, in the ordinary case, be subject to objection, is very helpful.

Mr. Smith: Well, if the Court please, on that basis we will withdraw the objection to the comparative value here because after all what we are trying to do is to determine a full determination of it. On the other hand, I did not want to sit by and not have an objection that if valid it would be overlooked.

The Court: Your objection is certainly valid, but in answer to that, I give you some idea of the Court's thinking. Do I understand the objection is withdrawn?

Mr. Smith: We will withdraw on that basis as to [21] comparative balance sheet.

Mr. Macomber: May the answer stand then, your Honor?

The Court: The answer that was previously stricken for the purpose of permitting an objection by counsel, will stand, the objection having now been withdrawn.

(Testimony of John K. Buxton.)

Mr. Macomber: At this time I offer in evidence the comparative balance sheet of the Diamond-S Ranch from 1953 to 1956, being defendant's B for identification.

The Court: The offer will be admitted in evidence and will bear the same letter B.

Q. Mr. Buxton, in preparing this balance sheet and in going over the books of the Diamond-S Ranch corporation, did you find anything wrong with the books? A. Yes.

Q. What?

A. Explicitly I found that throughout the years, even prior to the year 1950 and years we are speaking about, the subsequent years, the bookkeeper then in charge of the books failed to capitalize certain items of improvement and building improvements, etc., on the ranch throughout its entire life period.

Q. The figures were all there, however?

A. The figures were all there, but they were expenses instead of capitalized.

Q. But the bookkeeper charged certain items of expense that in [22] fact should be capitalized?

A. That is right.

Q. And you sought to correct that? A. Yes.

Q. How have you sought to correct that?

A. I took the steps—first of all, I came over to the ranch and with you and Mr. Wahyou I made a personal survey of all the improvements on the ranch and I drove around and he pointed out to me and described and I visually inspected all of

(Testimony of John K. Buxton.)

the improvements that had been made to the land. Then through what information we could get from the books and records, what information was known first-hand from people concerned at the time, I arrived at the value of these improvements that should have been put on the books and dates on which they should have been put on the books and thereafter it is my intention to correct the books and records and income tax returns to reflect the proper capitalization of these items.

Q. I show you defendant's Exhibit C for identification and ask you if this is the adjustments that you made to adjust the balance sheet as of December 31, 1956? A. Yes it is.

Mr. Macomber: I offer—

Mr. Smith: Just a minute. We haven't seen it.

Mr. Macomber: You have a copy of it.

Mr. Smith: Which one is it? We don't know what you [23] have.

Mr. Smith: Your Honor, we seriously object to the introduction of this Exhibit C, on the ground that it is pure conclusion on the part of the man who made the corrections. There was reconciliation from which are no documents before the Court to substantiate the position taken by the auditor. The year in which these various items were placed upon—or the improvements were placed upon—the ground are not reflected year by year in the balance sheet. It is simply a figure that has been picked out of thin air, without any basis having been laid for it other than his state-

(Testimony of John K. Buxton.)

ment that he made an appraisal of the property himself and was told what they cost.

The Court: May I see the offer?

Mr. Macomber: I might say I really do not care whether this goes in evidence or not. This is for the plaintiff's benefit, your Honor.

The Court: I would assume that perhaps the end result of this would be to show the higher capital valuation.

Mr. Macomber: It would have this effect—I don't want to tell the Court that all these items are written off and again I want to show the true picture. These items are still there, which would lower the net operating loss, not raise it.

The Court: Objection sustained.

Q. Mr. Buxton, do you have a record of the capital advances made [24] by the stockholders with you? A. Yes, I do.

Q. Do you have it by years?

A. Not by years. I have the total at the termination of this period, 1956.

Q. What are those totals?

The Court: What is this document?

Mr. Macomber: It is entitled, "Advances made by Stockholders."

Mr. Smith: We object on the ground there is no showing where it came from. As a second ground, it is total from 1950 and it is too remote, has no bearing on the matter before the Court.

Mr. Macomber: This is just a breakdown of one item in the balance sheet, your Honor.

(Testimony of John K. Buxton.)

The Court: Well, it is a breakdown of one item of the balance sheet which is now in evidence?

Mr. Macomber: Yes, your Honor. It is breakdown of the item "Stockholders' Advances."

The Court: On that statement, counsel, do you still stand on your objection?

Mr. Smith: Well, your Honor, it appears a breakdown by years in the exhibit which you had heretofore admitted. Now he brings a detailed offer, having broken down in years, and it is irrelevant for any purpose, because already he has [25] it broken down by years in an exhibit. It has no standing alone, it is meaningless.

The Court: I can't quite see the materiality of the offer, but it may have escaped me.

Mr. Macomber: I want to show which of the stockholders advanced. We have total amount of stockholders' advances.

The Court: How would that assist the Court?

Mr. Macomber: Well, it would show this, your Honor—the contention here is made, as I understand it, by this that Nutting profited illegally by his purchase of Corbari's stock. I want to show that on the contrary he did not. He put great amounts of money into this company, which he has no expectation or hope of recovery.

Mr. Smith: That, of course, has nothing to do with the transaction.

Mr. Macomber: If he had made a million dollars on the purchase of this stock, certainly that

(Testimony of John K. Buxton.)

would be immaterial. If he lost a million dollars by the purchase, that would be material.

Mr. Smith: It is what happened during May, 1951 that is material. Thereafter, if they lost thousands of dollars it is immaterial. It is what the condition of the company was on May 21, 1951 that is before the Court. A great many things could have happened by mismanagement, break in the markets, it is immaterial if on May 21, 1951 it showed a value in excess of [26] what he paid.

The Court: I agree with that, in a broad sense you are absolutely right, but there might have been many factors which in the meantime gave a value in excess of face value. That is what I am interested in. The objection is overruled. This is a matter in which there is a question of fraud. The scope of admission of testimony in fraud is before the Court and as I have already said, anything that seems to shed any light is going to go in. Has this been offered?

Mr. Macomber: No, I have not offered it. I have asked him to give us the information as he has on hand, data from the books as to each stockholder's advances.

Mr. Smith: Your Honor, it should be in evidence before it is testified to.

The Court: I would think so, counsel. I have it marked for identification. The offer will be marked defendant's Exhibit D for identification.

Mr. Macomber: I offer in evidence defendant's D.

(Testimony of John K. Buxton.)

Mr. Smith: And we again renew our objection to it on the ground it has no comparative value and what individual [27] stockholders have done in relation to the corporation is immaterial and irrelevant to this proceedings.

The Court: I agree that this is a proper observation except as to the defendant Wahyou. The Court is of the opinion it may have some pertinent value as to him. For that reason the objection is overruled and the offer is received in evidence as defendant's Exhibit D.

Q. Mr. Buxton, this shows stockholders' advances, K. R. Nutting, \$319,571.32 outstanding as of December 31, 1956, and Sam Wahyou stockholder's advances \$214,091.20, and F. H. Hogue, \$235,354.52, and others of \$46,100. Can you tell us what those others are?

A. The others are composed of certain advances that have been made by various companies owned by Mr. Sam Wahyou.

Q. Were any of those advances made by Mr. Corbari? A. None.

Q. Mr. Buxton, did you prepare an analysis of capital expenditures of Diamond-S Ranch Company from the year 1952 to date? A. I did.

Q. To show what was expended in capital improvements on the property? A. That is right.

Q. Do you have that broken down by years and by items? [28]

A. I do.

Q. I show you defendant's Exhibit E and ask

(Testimony of John K. Buxton.)

you if that document was prepared from the books and is an accurate representation of what is contained in the books?

A. These were prepared from the books and they are accurate and each figure may be substantiated.

Mr. Macomber: I offer this in evidence, your Honor.

Mr. Smith: We object to defendant's Exhibit E on the ground it is incompetent, irrelevant and immaterial and there is no proper basis laid, proper foundation laid, for admission of the exhibit.

The Court: Well, counsel, going into the matter of foundation, he has testified that he has in his possession all of the original bookkeeping and records, that he compiled this document from the books and records. Now do you desire to question on voir dire as to foundation?

Mr. Smith: I would like at this time to ask a few questions because early this last fall there was an order for production made by this Court for records. It is almost impossible to find any records and I would like to find out now where these records came from that these items are compiled from.

The Court: I think you are entitled to the information. [29] We will take the usual morning recess at this time and I assume you gentlemen will work out a stipulation as to the carrying capacity of the ranch.

Counsel: That is correct.

Recess taken at 11:00 o'clock.

11:15 a.m.

The Court: You may proceed.

Mr. Macomber: If the Court please, before we proceed with this witness, counsel has two items we would like to enter. One, this Court will take judicial notice of the laws of California——

Mr. Smith: So stipulated, your Honor.

Mr. Macomber: And the next stipulation is this, that we have here a copy of letter from the agent in charge of the government Grazing Service to Diamond S Ranch, showing that it has these grazing privileges. This is dated July 27, 1950, but this is the closest date we can get. It is stipulated this shall apply to 1951.

Mr. Greenfield: Yes.

Mr. Macomber: And shows 1771 AUMs on the federal range and 1921 AUMs on leased land, or a total of 3692 AUMs altogether, and that is for five-months' period.

Mr. Greenfield: Well, the period, your Honor, carries just from year to year, but anyway it is the AUMs, so that is [30] not material, really.

The Court: You wish to offer that in evidence?

Mr. Macomber: Yes, by stipulation I offer this.

The Court: The stipulated offer, being a copy of letter from the Grazing Service, July 27, 1950, dealing with the first grazing rights of the Diamond S Ranch Company, is admitted in evidence as defendant's Exhibit F. The judicial notice of the Court going to the California laws, I assume goes to the sections which have been referred to by re-

spective counsel and applicable to the Wahyou transaction.

Mr. Greenfield: And if your Honor please, I further specify Section 2235 of the Civil Code of California.

Mr. Macomber: Also goes, of course, to the authorities I have cited in my briefs.

The Court: Yes. The position of both of you is that the bona fide of the pledged sale is to be determined by the facts shown in evidence, plus the Civil Code. Now you want to ask some questions, Mr. Smith?

MR. BUXTON

resumed the witness stand.

Voir Dire Examination

Q. (By Mr. Smith): Mr. Buxton, when did you first become the auditor or [31] accountant for Mr. Wahyou in the Diamond S Ranch?

A. About the first of this year.

Q. And what did you find in the line of books concerning the financial transactions of the Diamond S Ranch Corporation?

A. Expressly this — the books are complete in every sense, showing the receipts and disbursements, journals and the general ledger from the year 1953 on. The year 1952 are on work papers but they have been audited, examined and attested. Prior to 1952 the records were substantiated by the tax returns, goes from the beginning of the corporation, 1945, on through. The explicit items that we

(Testimony of John K. Buxton.)

are concerned with here, such as improvements, land and ranch improvements, are found in detail in the records from the beginning.

Q. Now you say the items we are concerned with here are in detail in the record, is that correct?

A. Right.

Q. Are we not concerned with all of the items concerning the financial transactions of the Diamond S Ranch? A. I think we are, yes.

Q. Then are all of those records available at the office of the Diamond S Ranch?

A. The records are available, the ones I spoke of are available in the office of the Diamond S Ranch. All the records I spoke of are available and prior to that bank statements are available. We can build back, which we did. We built all the records back [32] from the years we had, on back to the beginning period.

Q. As a matter of fact, when you took over as auditor, excepting for the general ledger, from the commencement of the corporation up to the year 1953, there were practically no records, were there?

A. I will disagree with you for the year 1952. There are complete records for 1952.

Q. Up to 1952 there were practically no records?

A. No records in the sense of formal records. There are some records; there are bank statements, from which any set of books could be built.

Q. Then these records which you now produce are records which you have built yourself?

(Testimony of John K. Buxton.)

A. That is right.

Q. And from cancelled checks, from invoices and such other material of like nature that you could find in the office? A. Prior to 1952.

Q. There was no record of any kind worthy of the name of that at the time you started in, is that correct? A. Prior to 1952.

Q. Now the defendant's Exhibit B, which is denominated, "Diamond S Ranch Comparative Balance Sheets", does that sheet reflect what you found in the books, or does it reflect those alterations and changes which you made in the documents that you found? [33]

A. This balance sheet you speak of has no alterations. It is exactly what we found in the books.

Q. Now do you have a copy of that exhibit before you? A. I do.

Q. May I call your attention to the item, "Land, \$96,000." A. Right.

Q. You will note that item denominated "Land" starts out the year 1950 at \$96,437.42. The year 1953 it increases to \$103,539.30. Now is that the record that you found in the books?

A. With this correction, that the disparity there, which is some seven odd thousand dollars, was shown in improvements and it was not an improvement. It was shown on there dams, canals, wells, etc., so——

Q. Then, Mr. Buxton——

A. Wait a minute ——it is not a disparity of the figure whatsoever. If you take seven thousand

(Testimony of John K. Buxton.)

dollars out of that figure, then you have to add it back to sixteen thousand dollars, so I re-categorized it into its proper category.

Q. And this does not truly reflect——

A. I disagree. I say it does.

Q. Now, Mr. Buxton, let us finish the question first. Number 1, the item "Land", which you have in that Exhibit B, does not appear in the same figures in the ledgers which you took this from as such, does it? [34]

A. It does. Simply because——

Q. Just a minute, simply answer my question as asked. Does it appear that way or doesn't it?

A. Yes.

Q. Do you mean to state, then, that the ledger, under the item of "Land", which was the way it was capitalized and set up for the year 1953, shows the sum of \$103,539.30?

A. It doesn't classify that at all. The record shows simply the whole figure as one figure. I re-classified them, I reclassified that as land rather than classify as buildings and canals. I am not altering the record whatsoever. I am simply classifying it. As your record shows, you do not even have those records broken down. I have taken the trouble to break down in the type of item. I am not altering the figure, I have broken down into the proper category.

Q. Then is that true of any of these other items?

A. Such as?

Q. Well, you have the exhibit before you. Have

(Testimony of John K. Buxton.)

you made any other changes?

A. I have broken down lands from depreciable items and that is all, machinery and equipment. In some cases machinery and equipment might have been no improper figure, but he showed it in his books simply as one figure, depreciation assets.

Q. And you have reset all the books?

A. I have not reset. I have reclassified them for the purpose [35] of the balance sheet, to make more clear, more understandable.

Q. I mean in the books you made those corrections, so that you now have these items as they are set forth on this balance sheet?

A. I didn't make the corrections in the books. I simply classified them for the statement.

Q. So the books remain as they were at the time the two reports were furnished us, in every respect? A. That's right.

Q. How much time did you spend in setting this up, Mr. Buxton? How long did it take to work these records up?

A. Oh, I have been working on it for the last three weeks.

Q. Did you have any assistance during that time?

A. Yes, I had assistance of the chief accountant of the Diamond S, Mr. Sellers.

Q. Had he done any work on these books prior to this time? A. Yes.

Q. What had he done?

A. Done the normal work for such 1955 and

(Testimony of John K. Buxton.)

1956 entries and gone back and corrected, realigned and adjusted some of the entries made, built the balances together properly and generally straightened up the books.

Q. Until some point in the year 1952, until you came there three weeks ago and set these things up, there were no books actually worthy of the name, nothing you could determine the position of the corporation, is that correct? [36]

A. I would say from 1952 on——

Q. I said prior to 1952, that is true?

A. Prior to 1952 we had inspected tax returns. It is pretty good evidence.

Q. That is all you had; the receipts, the checks and all the various other things were scattered widely. You had to find some things in one place and some in another and you got them all together for the set of figures? A. All in the office.

Q. At least they were not entered in the books, so prior to 1952 that condition existed up until three weeks ago. Now turning to the balance of your exhibit, which I believe is Exhibit B, there are two more sheets on it. Those last two sheets were not admitted, were they, your Honor?

Mr. Halley: That is Exhibit C, I think, the objection was sustained.

Mr. Smith: Yes.

Q. One further thing, Mr. Buxton. Where did you get your inventory of livestock?

A. They were inventories that we had for physical at the close of 1954 and physical figure at the

(Testimony of John K. Buxton.)

close of 1955. I made a list of inventories. Those are the years we are concerned with.

Q. What about inventories of livestock for those years? A. I can't be positive——

Q. What did you use for the basis of your inventory of livestock? [37]

A. From figures shown on the tax returns.

Q. And nothing else. Did you make any attempt to segregate out the checks purchased for livestock, etc., or to make any other search other than the income tax returns? A. No sir.

Q. Or for any years prior?

A. Prior to 1952, no, it wasn't necessary.

Q. Mr. Buxton, in the matter of your judgment what was necessary, it is what you did I am trying to get at; so that, for the years 1952 and prior, such evidence as there was on the income tax returns is your basis for your figures, and nothing else. Is that correct? A. Correct.

Q. Now as to the valuation of the buildings on the land. How did you determine those?

A. Valuations on buildings, as I stated, I reviewed the present condition of the building and reviewed whether there were any improvements made. There were no changes, no corrections in that figure as they stand. Generally only a few hundred dollars there at the end, which I can verify.

Q. Now, Mr. Buxton, you have here an item under liabilities, "Chattel Mortgages on Livestock." The document, Exhibit B, shows in the year 1950, \$85,191.00 and for the year 1951, \$181,000.00, and

(Testimony of John K. Buxton.)

the next year, 1952, of \$421,000.00. Did you get those items off the books, or did you get evidence from [38] other sources as to those items?

A. First, may I correct—you call those chattel mortgages. That rather is stockholders' advances.

Q. Your figure is \$86,620.00 as to chattel mortgages on livestock. A. That is right.

Q. Where did that figure come from?

A. That figure came from the records in evidence of the tax returns for the year 1951 and subsequently were paid off and disappeared in 1952.

Q. And there are none in 1952?

A. That is right.

Q. Can you tell from your records what time they went off or it was not there in 1952?

A. No, I can not.

Q. All you know for sure it was off in 1952, is that correct? A. That's right.

Mr. Smith: That's all, Mr. Buxton.

The Court: Continue your direct.

Direct Examination—Resumed

Q. (By Mr. Macomber): I believe in my direct I had offered in evidence, your Honor, this document that is marked Exhibit E for identification. I renew my offer.

Mr. Smith: Did you furnish us a copy of that?

The Court: Analysis of capital expenditures for 1950 to date, is that it? [39]

Mr. Macomber: It shows the rights prior to 1952 and what items of capital expenditures have been

(Testimony of John K. Buxton.)

made from 1952 to date and the years' classifications.

Mr. Smith: Are you offering it?

Mr. Macomber: Yes.

Mr. Smith: We object to the offer, your Honor, on the grounds it is incompetent, irrelevant and immaterial.

The Court: Objection overruled. The offer may be received in evidence.

Q. Mr. Buxton, your income tax return for the year 1950 and the financial statement of the Diamond S Ranch Company for that same year, is there some discrepancy?

A. For the year 1950?

Q. It is either 1950 or 1951. 1950, I think.

A. I don't recall. I made some adjustments. Somewhere back in there the accountant who was doing the work reduced his fixed assets for full depreciated items; in other words, his cost. Now I adjusted that to reflect the cost assets. It has no actual effect on the balance sheet because you show a larger asset and a larger liability depreciation, but I did get together the correct items to begin with by identification and showed the adjusted depreciation, and those records were all found.

Q. This analysis of capital expenditures account, tell the Court what it shows in capital expenditures prior to 1952. [40]

Mr. Smith: The exhibit speaks for itself.

Mr. Macomber: Let's summarize it for the Court.

A. Prior to 1952—

(Testimony of John K. Buxton.)

Mr. Smith: Just a minute. I made an objection on the ground the exhibit speaks for itself.

The Court: Certainly the objection is a valid one, but the Court seeks all in this matter. If this witness can explain the exhibit, it will assist the Court. Objection overruled.

Q. The cost of improvements prior to 1952 was \$137,545.11 and since 1952 up to December 31, 1956?

A. The subsequent improvements on the books were \$104,633.05.

Q. Now what were the improvements prior to 1952, not counting the land?

A. Not counting the land then they would be some thirty-four thousand odd dollars.

Q. But including the land it is the figure you gave?

A. Including the land it is one hundred thirty-seven thousand. The land is shown at the one hundred three thousand figure, so it is thirty-four thousand plus.

Mr. Macomber: That's all.

Cross Examination

Q. (By Mr. Smith): Mr. Buxton, you have been testifying as to values here as to various items. Now those are strictly book values, are they [41] not?

A. What do you mean by book values?

Q. That is a figure which came from the books, either as cost or arrived at in some other way, depreciated cost, or something else? It has nothing to do with the actual value of the property?

(Testimony of John K. Buxton.)

A. These figures we are talking about here——

Q. No, I am not talking about that. You have been talking about values. You gave the land value, I believe, at ninety-five thousand and another place one hundred three thousand, whatever the figure was. Now that is book value of the property, isn't it?

A. It is cost value.

Q. Well, cost and the book would be the same, excepting for your depreciation?

A. That is right, with that exception.

Q. All right; but you are talking about either cost or book at one time or the other here. I mean it doesn't in any way reflect the true value, does it, the market value?

A. No.

Q. So any figure you have given is either cost or book?

A. I can't answer yes to that because book and cost has a definite understanding with me.

Q. All right, Mr. Buxton, will you clearly state to the Court what values you did use? [42]

The Court: Are you trying to get over to the Court the fact that these do not represent sales value?

Mr. Smith: That is correct.

The Court: He said they didn't.

Q. Did you make new tax returns for this corporation, based upon the changes, the errors, that you discovered?

A. Not as yet. I intend to amend the 1956 and prior returns, as far as I can, which means three years.

(Testimony of John K. Buxton.)

Q. But that has not yet been done?

A. That has not as yet been done.

Mr. Smith: That's all, your Honor.

The Court: You may be excused.

SAM WAHYOU

a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Macomber): Your name is Sam Wahyou? A. Yes sir.

Q. Where do you live, Mr. Wahyou?

A. Stockton.

Q. And are you a stockholder in the Diamond S Ranch Company? A. Yes.

Q. Are you an officer in the Diamond S Ranch?

A. Yes.

Q. And an officer, are you? [43]

A. President.

Q. And you have been since the corporation was formed in 1945? A. Yes.

Q. And you have been a stockholder all that time? A. Yes.

Q. By the way, do you know what the term of the Milem lease is? A. Year by year.

Q. Before this suit that we are engaged in trying here today was brought against you and the Diamond Ranch Company, did you know that Corbari had made an assignment to the John Smeed estate? A. No.

(Testimony of Sam Wahyou.)

Q. At the time of the sale of the Corbari stock on May 21, 1951, was Mr. Corbari a director of the corporation? A. Yes.

Q. And was he operating the ranch at that time as superintendent? A. Yes.

Q. At the time you purchased Mr. Corbari's stock on May 21, 1951, did Mr. Corbari owe you any money? A. Yes.

Q. You purchased his note secured by an assignment of the stock from the Bank of America?

A. Yes.

Q. For how much money? [44]

[Answer missing.]

Q. And were there any special facts, anything known to you at that time, or the time you purchased this stock, which would lead you to believe that this stock had any particular great value?

A. No. Somebody—

Mr. Greenfield: Just a minute—I object on the ground it is too indefinite and vague, too general.

The Court: I think the objection is good, counsel. I wouldn't know what you mean by special facts.

Mr. Macomber: Well, any special circumstances, things that would lead him to believe this stock had a greater value than would be apparent to any other person.

Mr. Greenfield: Same objection, your Honor.

The Court: I think, counsel, you may reach the point you are trying to make—the question is—

Mr. Macomber: It is hard to prove a negative

(Testimony of Sam Wahyou.)

and that is what I am trying to do, but I have to do it sort of step by step to show what he had in his mind at that time.

The Court: Very well, you may proceed then, if that be your position, and counsel has a right to object.

Q. Now before you bought Mr. Corbari's stock, did you know that the bank was going to foreclose?

A. Yes. [45]

Q. Had anybody, any officer of the Bank of America, Hunter Square Branch, either written you or talked to you about it?

A. They sent me a letter.

Q. And do you have that letter?

A. No. I have it at home.

Q. Did they write you more than one letter?

A. Oh, two or three letters.

Q. Do you recall what they said in the letter?

Mr. Greenfield: We will have to except to that. That is hearsay.

Mr. Macomber: It wouldn't be hearsay and I ask the answer go in and be limited to what effect it had upon his mind.

The Court: For that limited purpose, it may be admitted.

Q. What did the letter say?

A. I can't remember exactly what the letter was. He asked me—to tell me about the foreclosure, the stock, so he asked me to buy it, so I went down and talked to him, talked to him and finally I bought it and I arranged the deal with the bank

(Testimony of Sam Wahyou.)

and completed the papers to buy the stock, so I sent my lawyer, Mr. Macomber, to pay the bank for the transaction.

Q. Did you know if the bank were negotiating with any other person to buy that stock?

A. Yes. [46]

Mr. Greenfield: Just a moment, your Honor. In the first place, I think it is irrelevant or immaterial whether the bank was or was not negotiating. In the second place, unless the witness can show, to a greater extent than he has, how he knows, I think the question is improper. It is hearsay.

The Court: I think it is getting around to hearsay. It is pretty obvious.

Mr. Macomber: It probably is, except I stipulated his testimony would be limited to the effect upon his mind.

The Court: Well, his method and intention is rather important here and perhaps it should not be permitted to be built up on hearsay. Objection sustained.

Q. At the time you bought Mr. Corbari's stock, did you have an opinion as to what the value of that stock was at that time?

A. Oh, I felt that the ranch had a future. The stock was worth more than five thousand dollars. I felt it was worth the money because the reason I bought the stock I didn't want somebody outside to hold the stock. That is why I bought it. He owed me money and so I thought it was a pretty fair buy for what I paid for it, so I bought it.

(Testimony of Sam Wahyou.)

Q. You expected to make money on it?

A. Oh sure. I wouldn't invest unless I make money.

Q. Did you make any money as the result of your purchase of this stock? [47] A. No.

Mr. Greenfield: I want to object on the grounds it is irrelevant and incompetent, and explain to the Court why I strongly feel that this particular line of testimony is irrelevant and immaterial. It may well be, that as the Court has said, it is material, the financial condition of the Diamond S Ranch Company over a five-year period, but I do not think it is material as to whether or not Mr. Wahyou made money or did not make money out of this transaction. I certainly object to it on that ground.

The Court: Well, you have consented—

Mr. Greenfield: Let me try again. I mean this, your Honor, if the purchase of Mr. Corbari's stock by foreclosure by Mr. Wahyou was an improper, unfair act and was a violation of fiduciary position of trustee of the corporation, then whether he lost or profited in subsequent years by his improper act and his breach of his fiduciary position is certainly irrelevant as to whether or not the transaction here stand or not stand, and that is what I mean.

The Court: I go along with you but I am presently of the opinion, for what it is worth, whether he lost or made money is something depending on the nature of the answer that may or may not be considered by the Court. It may have some materiality and on the [48] other hand it may not.

(Testimony of Sam Wahyou.)

Mr. Macomber: I would like to point out, I know the Court has overruled the objection, but I do want to say this, if Mr. Wahyou, as a result of buying this stock, had made a large sum of money on it, then the Court may be able to conclude that he had some special knowledge or something about this stock when he bought it, knowing it was worth more. In other words, the proof of the pudding is in the eating, and if Mr. Wahyou made a large sum of money as the result of his purchase of that stock, even up to date, I am sure the plaintiff would like to show that it would be very material evidence, and that is his contention, I think.

The Court: As I said, the Court knows it is going to weight. It may be entirely valueless; on the other hand, it may have some value relating to circumstances. Let us get back to the question.

Q. Did you make any money as the result of your purchase of the Corbari stock? A. No.

The Court: I might say at this point, on that answer "no," standing as it does in isolation, does not mean anything at all. That is not an explanation. That merely backs up what I said previously.

Mr. Macomber: Of course, the detail of it would be in the books and records of the corporation, your Honor.

The Court: I think, inasmuch as this witness will be on for some considerable time, we will take our recess. The Court will be in recess until 1:15.

(Recess taken at 12:00 noon.)

1:15 P.M.

The Court: The witness Wahyou was on the stand.

Mr. Halley: Yes. If the Court please, we would at this time ask to call a witness out of order, who is here from Stockton, who will testify concerning actual foreclosure sale. I would like to put him on and let him go back to Stockton if agreeable.

The Court: Any objection?

Mr. Smith: No.

The Court: Very well, you may put the witness on out of order.

GORDON J. AULIT

a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Halley): Will you state your name please? A. Gordon J. Aulit.

Q. Where do you live? A. Stockton. [50]

Q. What is your business or profession?

A. Lawyer.

Q. How long have you been engaged as a lawyer in Stockton? A. Since 1949.

Q. You were practicing there in Stockton on the 21st of May, 1951, were you? A. I was, yes.

Q. Do you recall an incident on that day in which you were acting as agent of Sam Wahyou?

A. Yes, I do.

Q. Did that incident consist of attending a foreclosure sale of pledged stock?

(Testimony of Gordon J. Aulit.)

A. Yes, I attended such a sale.

Q. Where did you attend the sale?

A. It was at the south entrance of the San Joaquin courthouse, also known as the Main Street entrance of the courthouse.

Q. That is in Stockton? A. Yes.

Q. Who was present at that time?

A. Mr. Macomber and myself.

Q. What transpired?

A. Well, we went over to the south entrance of the courthouse immediately before the time set for the sale, Mr. Macomber and myself, and upon arriving at the south entrance, the Main Street entrance, Mr. Macomber conducted the sale, checked the time to [51] determine he was conducting the sale on schedule, checked, as I remember, with his watch and my watch and with the clock on the corner of the Stockton Savings & Loan Bank Building, and at the time appointed the sale was conducted.

Q. What did Mr. Macomber do?

A. Mr. Macomber, upon checking the time, read the notice of sale.

Q. Did you hear the notice read?

A. I heard it read.

Q. Did you check the time mentioned in the notice against the clock, and these other instructions?

A. Yes, we checked the time and it was accurate.

Q. Did you check the date?

A. Yes, checked the date also.

(Testimony of Gordon J. Aulit.)

Q. After the notice was read what happened?

A. Mr. Macomber asked if there were any bids for the property being sold.

Q. What property was being sold?

A. Shares of stock, three hundred ten shares of stock, and I stated on behalf of Sam Wahyou I bid five thousand five hundred dollars. Mr. Macomber then asked if there were any other bids. There were no other persons actually present, other than walking in the area, because it is the entrance to the courthouse, but no other persons actually in the immediate vicinity attending the sale. He then called \$5500 once, called \$5500 a second time [52] and called \$5500 a third time and sold it for \$5500.

Q. Upon your bid?

A. Upon my bid for Mr. Wahyou.

Q. On behalf of Mr. Wahyou? A. Yes.

Q. That was the amount of the note that Mr. Wahyou was holding?

A. To the best of my knowledge, yes.

Q. You say there were people going in and out of the courthouse when this happened?

A. Naturally at that hour there would be, yes.

Mr. Halley: You may examine.

Cross Examination

Q. (By Mr. Greenfield): What is your relationship of Mr. Macomber?

A. I am employed by Mr. Macomber, as well as maintaining my own practice in his office.

Q. That situation prevailed in 1951?

(Testimony of Gordon J. Aulit.)

A. Yes, it did.

Q. Then as a matter of fact Mr. Macomber, on behalf of Mr. Wahyou, dispatched you to act as Mr. Wahyou's agent in this instance?

A. Yes, that is correct. He asked me to attend the sale.

Q. You were aware, of course, at the time that Mr. Macomber was Mr. Wahyou's attorney?

A. Oh yes.

Q. Were you familiar with the Diamond S Ranch Company's file [53] in your office at that time?

A. No, I was not. I might have some familiarity with some portions of it, but I couldn't tell you right now what portions. Naturally I would run across it, being in the same office.

Mr. Greenfield: That is all.

SAM WAHYOU

resumed the witness stand on further

Direct Examination

Q. (By Mr. Macomber): Have you made any effort to sell this ranch? A. Yes.

Q. At what different times?

A. Many different times, '48, '49, '50 I tried to sell it.

Q. Have you asked different real estate men to try to sell it? A. Oh yes.

Q. What sales price were you asking?

A. Well, different times different prices. One time we set it for one hundred ninety thousand;

(Testimony of Sam Wahyou.)

one time we had a party interested for two hundred forty thousand dollars. The deal didn't go through because the people didn't come up with the money, and as time went on, we asked more money because we put a whole lot more money in all the time.

Q. And it is for sale, is it, now? A. Yes.

Q. Have you ever had any concrete offer for the property? A. No.

Q. That is, anything that you could accept and make a deal out of? [54]

A. No. I have talked to a lot of people about it, but never had an offer yet.

Mr. Macomber: That is all. You may cross examine.

Cross Examination

Q. (By Mr. Greenfield): Mr. Wahyou, Mr. Macomber is your attorney at present. How long has he been your attorney? A. Oh, twenty years.

Q. And he has been attorney for the Diamond S Ranch Company since its inception?

A. He is attorney——

Q. For the Diamond S Ranch Company since it began? A. Yes.

Q. As your attorney and attorney for the Ranch Company, do you keep him well advised of the Ranch Company's affairs? A. Sure, yes.

Q. You always have? A. Yes.

Q. Mr. Wahyou, you stated that you endeavored to sell this ranch numerous times. Did you try to sell it, say in 1954? A. 1954—yes.

(Testimony of Sam Wahyou.)

Q. What price did you have on it at that time?

A. In 1954—I can't remember, but '54 close to a million dollars.

Q. Did you consider a million dollars to be a fair price for it? [55]

A. Well, I never can get a million dollars because——

Q. Just a moment—answer that question. In 1954, when you had the ranch for sale at a stated price of a million dollars, did you consider a million dollars was a fair price for that ranch? Yes or no.

A. A pretty good price, yes.

Q. Now in 1954, Mr. Wahyou, did you succeed in borrowing some money on the property?

A. Yes.

Q. How much money did you borrow?

A. Two hundred twenty-five thousand dollars.

Q. From whom did you borrow it?

A. Central Valley Bank.

Q. Before you borrowed that money, did you ask an official of the Central Valley Bank to make an appraisal of the ranch?

A. Yes.

Q. Was that appraisal made?

A. Yes. I didn't—they make the appraisals.

Q. Yes, but the appraisal was made, wasn't it?

A. Yes, the bank sent two people out there.

Q. And you asked them to do that?

A. Yes.

Q. Was the appraisal made by Mr. Wisecarver?

A. Yes.

Q. What was the amount of the appraisal? [56]

(Testimony of Sam Wahyou.)

A. I don't know.

Q. Would the sum of \$487,300 as the amount of the appraisal be correct?

A. Well, I don't know what they appraised it for. I wanted to borrow money.

Q. Do you know what percentage the bank was loaning at that time of the appraised value?

A. That I do not know.

Q. Would it have been fifty-five per cent?

A. Well, I don't know what they base it on.

Mr. Greenfield: Your Honor, may I have the deposition of Robert Wisecarver, which is in the Court's file? The deposition, if the Court please, has, of course, not been opened. May we request it be opened at this time?

The Court: The deposition may be published and opened.

Mr. Greenfield: Now would the clerk mark that as an exhibit? The plaintiff now offers in evidence the deposition of Robert Wisecarver, the appraiser of the Central Valley Bank, who made the appraisal of the Diamond S Ranch Company in 1954, at the request of the witness, Sam Wahyou, together with exhibit attached thereto, being the appraisal itself.

Mr. Macomber: To which the defendants object on these grounds: first, that no proper foundation has been laid in this, that it is not shown here that this appraisal was made by Mr. Wisecarver as agent of Mr. Wahyou. Mr. Wisecarver made it as [57] an officer of the bank and obviously made it

(Testimony of Sam Wahyou.)

not? A. 1951—the question you asked——

Q. I am sorry, let me restate it. The Diamond S. Ranch Company, a corporation, had certain assets in 1951. Those assets consisted of land, didn't they? A. Land and improvements.

Q. Now in 1954 the Diamond S Ranch Company had certain assets? A. Yes.

Q. Those assets were the same assets as they had in 1951, weren't they, same land, same improvements?

A. No, not the same improvements.

Q. You had added some improvements?

A. Oh yes, lots of improvements up there.

Q. Do you have an opinion as to the fair value of the improvements that were added in those intervening years, between 1951 and 1954? [60]

A. I really don't know. I know we spent lots of money.

Q. But would you say that the major assets of the ranch were substantially the same both years, except for the improvements you added in the way of new buildings, a well or two and cleaning ditches and fixing the fences?

A. Well, after 1951 we fixed the fences, was a new corral, feed rooms, wells, cleaned all the ditches, new ditches, lots going on there.

Q. The same land, however?

A. The same land is right.

Q. Would you say the improvements you put on were worth more than fifty thousand dollars?

A. Oh yes, more than that.

(Testimony of Sam Wahyou.)

Q. Would you say they were worth seventy-five thousand dollars?

A. I think so. I don't know how the accountant set it up.

Q. Well, we are not concerned with the accountant right now. I am just trying to get your opinion—about seventy-five thousand dollars?

A. Well, the improvements was more than that.

Q. A greater cost to you than that. Is this between 1951 and 1954, or between 1951 and the present date?

A. Oh, you talk between 1951 and 1954?

Q. Yes. Between 1951 and 1954, or two or three year period, would you say your improvements ran twenty-five thousand dollars? [61]

A. No, more than that. We levelled some land there too.

Q. As much as fifty thousand?

A. I can't tell you exactly because I never paid very much attention to that.

Q. You don't think in those three years it ran over fifty thousand, do you?

A. Maybe, could be more than fifty thousand.

Q. Would that be close?

A. I couldn't tell you. I don't remember, because we levelled some land between those years and we put wells in and we had a dragline there to open a ditch.

Q. In other words, you don't really know?

A. I don't know. I couldn't tell you exactly how much improvements were.

(Testimony of Sam Wahyou.)

Q. All right, we will let that go. Now, Mr. Wahyou, we were talking a little while back about your purchase of this stock and your reasons for purchasing it. I think you testified that you bought the stock, the Corbari stock, I think you testified you bought it because for one thing you wanted to make some money out of it, expected to make some money out of it, and you said that Mr. Corbari owed you some money besides. Now after you purchased this stock, was it your intention to credit Mr. Corbari's debt?

A. Credit his debt? What do you mean?

Q. With the amount of the stock worth over what you paid for it. [62] You didn't have any intention of crediting Mr. Corbari with the excess value of the stock? A. No.

Q. You were going to keep it and make what you could out of it, is that right? A. I——

Q. Is that right?

A. Let me explain it to you, what my thinking is.

Q. All right, go ahead.

A. The reason I bought it, I believed we had a ranch we could make money out of. I had been carrying Mr. Corbari, he was in very bad condition in 1954 and he owed me money. If I hadn't bought his stock, somebody else would bought it, so I didn't think it bad for the amount of money I spent to buy his stock, and also I guaranteed another note for him. He borrowed some money——

Q. What other note was this?

(Testimony of Sam Wahyou.)

A. The fellow's name was Zignagle.

Q. How much was that note for?

A. I can't say—twelve thousand.

Q. You guaranteed that note?

A. That is right.

Q. And it was your intention then to buy this stock, to make it your own and then were you going to give him some credit on this note you guaranteed? I think you said not, didn't you? [63]

A. What credit?

Q. You didn't intend to give him any credit on the note you guaranteed or to pay any part of the note and credit him with the balance?

A. No, no.

Q. If the stock was worth twenty thousand dollars, it was your intention to keep the fifteen, is that right? A. Sure.

Q. So then one of your reasons for purchasing the stock was to protect yourself on the Zignagle note? A. Right, and also the future.

Q. And also the future? A. Yes.

Q. The future, at the time you bought it, you considered bright? A. That's right.

Mr. Greenfield: That's all, I think, your Honor.

Redirect Examination

Q. (By Mr. Macomber): Mr. Wahyou, on this loan, two hundred twenty-five thousand dollars, from the Central Valley Bank, did you guarantee that loan personally?

Mr. Greenfield: Just a moment—we think that

(Testimony of Sam Wahyou.)

is clearly incompetent, irrelevant and immaterial, not bearing on the issues in this case.

Mr. Macomber: That was why the appraisement was made, [64] for this loan. I want to show that the loan wasn't made simply on the strength of the property or ranch. The loan was made on other considerations; to-wit, his personal guarantee. I expect likewise to show, in connection with his personal guarantee, he gave a personal financial statement to the Central Valley Bank, upon which he listed his shares in the Diamond S Ranch, and I want to show what value he placed on the shares at that time.

The Court: You are referring to the loan made as a result of the Wisecarver appraisal?

Mr. Macomber: Yes, your Honor.

The Court: Objection overruled. Proceed.

Q. Did you personally guarantee that loan?

A. Yes. The reason he gave me the loan over there was because I asked—

Mr. Greenfield: Just a moment. I object to the answer as being unresponsive and ask it be stricken. It is purely hearsay.

(Answer read.)

The Court: I ask that you start over. The answer so far given is stricken.

Q. Do you know whether the bank would have made the loan without your personal guarantee?

Mr. Greenfield: I object—calls for conclusion as to what was in some one else's mind; incompetent.

(Testimony of Sam Wahyou.)

The Court: The bank may have said to give his personal guarantee. [65]

Mr. Greenfield: I think in that event it would be hearsay.

The Court: What was the answer?

Mr. Greenfield: There was no answer.

Q. Did the bank demand your personal guarantee on that note? A. I gave it to them.

Q. Did the bank demand that you personally guarantee it? A. Sure.

Q. Did you give the bank a personal financial statement in connection with your personal guarantee? A. Yes.

Q. I show you defendants' Exhibit G for identification and ask you if that is a true and correct copy of your personal statement that you gave Mr. Wisecarver in connection with your guarantee to the bank? A. Yes.

Q. On this statement it shows your shares of stock in the Diamond S Ranch Company——

Mr. Smith: Just a moment please. Let us not testify to the statement if the Court please, until the exhibit has been offered.

Mr. Macomber: I offer this statement in evidence, your Honor.

Mr. Greenfield: May I request the Court to glance at this exhibit, your Honor please. To begin with, you will note [66] the financial statement is of some date in 1956—December 31, 1955. How that could possibly have bearing on a loan which the

(Testimony of Sam Wahyou.)

witness has testified he received in 1954, I am unable to understand.

Mr. Macomber: It is part of the same transaction, the plaintiffs opened the door to it.

The Court: It is signed January 14, 1956.

Mr. Greenfield: But the top of it shows it is as of December 31, 1955, and I can not see how it possibly can have bearing on this transaction. It certainly couldn't have been a financial statement he submitted to the bank at the time he requested the loan in 1954.

The Court: Well, I am not commenting on this offer at the moment. I am merely saying it may be a later statement required by the bank as part of the transaction, a procedure with which we are all familiar. The banks, having executed the loan, required the person given it to make a statement.

Mr. Greenfield: As I understood it, your Honor, the exhibit is being introduced as being a true copy of the one he submitted.

The Court: Objection sustained. On the face of it, it is not connected.

Q. Mr. Wahyou, have you given the Stockton [67] Savings & Loan Bank statements in the past few years, financial statements? A. Yes.

Q. And have you listed on those statements your shares of stock in the Diamond S Ranch Company?

A. Yes.

Q. What value did you place on that stock?

Mr. Greenfield: Just a moment, your Honor. I object to the question on the ground it seeks to

(Testimony of Sam Wahyou.)

elicit a purely self-serving declaration; has no probative value and is incompetent in this action. For that reason we object to it. I might elaborate to the Court, what possible value would it be to have Mr. Wahyou state what he thought his stock was worth?

Mr. Macomber: It is his stock, he can give his opinion.

Mr. Greenfield: He has given it numerous times and I don't think the value he placed on it in the financial statement has any bearing.

The Court: The Court is of the opinion that he may state what, in his estimation, the value of the stock was, but that still doesn't furnish sufficient materiality to put in these remote statements of 1956. We are all conversant with bank statements given by a borrower to the bank. Generally they are based on wishful thinking to start with. [68]

Mr. Macomber: I will withdraw my offer.

The Court: Well, the Court has ruled on it anyway, being not admissible. We double that by withdrawing.

Mr. Macomber: That's all.

Mr. Greenfield: I think that is all we have.

(Witness excused.)

Mr. Macomber: The defendant rests, on its direct.

Mr. Pike: Your Honor, at this time, on behalf of the plaintiffs, I wish to move for judgment in favor of the plaintiffs, as prayed for in plaintiffs' complaint, and as grounds for that motion particu-

larly refer to the provisions of Section 2235, Civil Code of California, which is set out on page 6 of the plaintiffs' trial brief, and which reads:

"All transactions between a trustee and his beneficiary during the existence of a trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration and under undue influence."

and I refer to the decision of the Federal Appellate Court, setting out the burden of the defendant in this case to establish certain elements, and it is the plaintiff's contention [69] that the defendant has failed to sustain that proof.

The Court: The plaintiffs' motion is denied.

CHARLES SEWELL

a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Smith): Will you state your name, please? A. C. S. Sewell.

Q. Where do you reside? A. Elko County.

Q. Elko County, Nevada? A. Yes sir.

Q. How long have you been a resident of Elko, Nevada? A. My lifetime.

Q. How old are you? A. Fifty-five.

Q. What is your occupation, Mr. Sewell?

A. I have been in the livestock business all my life.

Q. Now if you will, elaborate on that briefly to

(Testimony of Charles Sewell.)

the Court, stating some of the properties in Nevada that you have owned and operated, the number of sheep and cattle you have operated, the experience you have had with the Taylor Grazing Act, etc., general background of your business experience as a rancher in Nevada.

A. Since 1928 I have been operating the live-stock business on my own account. My father passed away in 1928. I have operated [70] several ranches in Elko County, also Lincoln County and Owyhee County, State of Idaho.

Q. Will you name the ranches by name in Nevada you have operated and describe them briefly.

A. I owned the Tribune Ranch, the Seville Ranch, the Tanney Ranch, Gambill Ranch, Jacke Ranch, all of those were in Elko County.

Q. And did you own other ranches in Nevada?

A. No.

Q. Have you owned other ranches in Owyhee County, Idaho, which is west of Elko?

A. Yes.

Q. What did you own there?

A. What is known as the Flying H Ranch, the UD, the Levenbaugh and Burtlock.

Q. They are all located at Riddle, Idaho?

A. That is right.

Q. That is in the south central portion of Owyhee County, Idaho?

A. They lie along the Nevada State line.

Q. And the territory there, the operation is a good deal the same as the ranches you operated in Elko County, Nevada?

(Testimony of Charles Sewell.)

A. The same, yes sir.

Q. What is your academic background?

A. You mean my schooling?

Q. Your schooling. [71]

A. I am a graduate of Stanford University.

Q. What year? A. 1923.

Q. What degree? A. A.B.

Q. What did you do after your graduation from Stanford in 1923?

A. Went to work for the First National Bank in Elko.

Q. How long were you there?

A. Off and on for thirteen years.

Q. What was your position with them, what did you do there? A. I was cashier.

Q. And was that bank principally and largely interested in financing ranchers and ranches?

A. We had loans of livestock.

Q. What did you have to do with those loans, if anything?

A. Well, I was responsible for appraising them in the first place and servicing them.

Q. Seeing that if they got in trouble they got out, things of that nature?

A. That is right, seeing that we got our money.

Q. Now, Mr. Sewell, you have mentioned all the various ranches you have owned. What about the number of cattle and sheep you have owned and run in the various years?

A. Those ranches at?

Q. Riddle. [72]

(Testimony of Charles Sewell.)

A. I had rights for five thousand cattle, forty-five hundred sheep.

Q. Did you operate both cattle and sheep?

A. Yes.

Q. Over what years?

A. I operated from 1928 to 1956.

Q. As a matter of fact, it is within the last few months that you disposed of your properties at Riddle, isn't it?

A. 1956, yes sir.

Q. What about your operations of livestock in Elko County, Nevada?

A. Well, the Gambill Ranch was a very large ranch.

Q. Just relate your experience with that.

A. Had no sheep. That was in cattle. It was a ranch that had lots of range, had twelve months' permit and twelve months on the federal range.

Q. Did you operate all of the cattle on the Gambill Ranch?

A. Around four thousand.

Q. What years were involved in that operation?

A. I believe we bought the Gambill Ranch in 1949 and sold it in 1952.

Q. You ran about four thousand head of cattle on it during those years?

A. That is right.

Q. What other livestock operations have you had? [73]

A. I have been in the sheep business.

Q. Just what was the nature and extent of your sheep business?

A. The highest sheep operation I had ran forty-five hundred units.

(Testimony of Charles Sewell.)

Q. That was in Idaho? A. That is right.

Q. You never operated a sheep ranch in Nevada? A. No sir.

Q. Now, Mr. Sewell, are you acquainted with the properties of the Diamond S Ranch Company, located in Humboldt County, Nevada, and located near the town of Golconda, Nevada?

A. Yes sir.

Q. What is the nature of your acquaintance there?

A. The first time I was there on the Diamond S was in '38 and '39.

Q. What were you doing there at that time?

A. Bought a bunch of cows and calves from Stewart and Polkinghorn.

Q. At where?

A. Pumpernickle, south of Golconda.

Q. In 1938 for the first time you were on what is now known as the Diamond S Ranch in Humboldt County? A. That is right.

Q. Have you had occasion to observe it from time to time since 1938? [74]

A. I have been there lots of times.

Q. Well, have you been on the properties?

A. I was there last fall.

Q. Is the operation of that property similar to any properties that you operated up in Elko County?

A. That is very similar country.

Q. How far is it from the Diamond S Ranch

(Testimony of Charles Sewell.)

properties at Golconda to the ranches that you had in Elko County?

A. Probably eighty-five miles.

Q. And in your judgment it is a similar operation? A. That's right.

Q. Now, Mr. Sewell, what has been your experience with the Taylor Grazing Act?

A. You mean from an operating point?

Q. From an operating point, what has been your experience?

A. Well, the Taylor grazing rights are based on the property and commensurability.

Q. And from the time it came in 1932 until today, until 1956, you have had to operate under the Taylor Grazing Act on your ranches in Nevada and Idaho? A. It didn't come in in 1932.

Q. What year did it come in? A. 1936.

Q. Since 1936 then you have had to operate under the Taylor Grazing Act? [75]

A. That is right.

Q. You have had reason to determine values of Taylor grazing rights as they bear to the real property to which commensurability was attached?

A. That is right.

Q. And is there some rule of thumb which you used to determine the value of operating a ranch in comparison to the Taylor Grazing rights?

A. Well, a ranch without any Taylor grazing rights wasn't worth very much money.

Q. What is the rule of thumb, as near as you

(Testimony of Charles Sewell.)

know, if you do know, that animal unit bears to the price of the ranch?

A. Well, that depends on the value of the livestock. If livestock is high, values are higher.

Q. All right, are you acquainted with the price of livestock in 1951?

A. I was in the business at that time.

Q. Mr. Sewell, you mention you were on the Diamond S properties in 1956 again?

A. That is right.

Q. Will you state to the Court generally what you did at that time on the property?

A. I was there at the request of the plaintiffs in this action, to make a determination what I thought it was worth.

Q. Who accompanied you on this inspection?

A. Mr. McDowell and Mr. Jack Utter.

Q. Mr. McDowell of Boise? A. Yes, sir.

Q. And Mr. Utter of Reno? A. Yes, sir.

Q. What type of examination did you make, briefly state?

A. Well, we went out to the Diamond S and spent parts of three days, most all of three days, driving around the fields, driving to the wells, driving up to the reservoir, all around the ranch.

Q. You measured the buildings?

A. Measured the building headquarters.

Q. Did you determine, from your knowledge of the ranch beforehand and your knowledge of the ranch as the result of this inspection, what would

(Testimony of Charles Sewell.)

be its most useful use, most profitable use, as a ranch?

A. I think there is only one use put it to.

Q. What is that use? A. Raising cattle.

Q. And as a cow and cattle outfit, would you say?

A. Well, I think you could either do that or raise feeders, buy feeders and run them through the season.

Q. Now, Mr. Sewell, to your knowledge of the live stock industry generally, knowledge that you gained from the inspection of the Diamond S Ranch property—by the way, before I ask—your Honor, may I withdraw the question? [77]

The Court: The question may be withdrawn.

Q. Mr. Sewell, when you made inspection of the Diamond S Ranch properties, did you make any study of the water rights in connection with it?

A. The water rights in the Humboldt River are all adjudicated and adjudged.

Q. And you looked into that adjudication?

A. Yes sir.

Q. You know what is appurtenant to the properties we are now discussing?

A. It has some very old rights there.

Q. And did you go to the Taylor Grazing office in Winnemucca and determine what rights were appurtenant to the various properties and leases?

A. Yes sir.

The Court: What are you talking about now? You are talking about water?

(Testimony of Charles Sewell.)

Mr. Smith: I asked him if he had determined what the grazing rights were appurtenant to the Diamond S Ranch properties in Humboldt County, Nevada.

The Court: Just a second—when you refer to the water rights on the Humboldt River, to what decree are you referring?

A. I believe the original decree signed by Judge Bartlett, later amended somewhat. [78]

The Court: Thank you.

Q. Mr. Sewell, were you on any ranch properties in Humboldt County, Nevada as of May, 1951?

A. I have been around Humboldt County quite a bit.

Q. And were you familiar with the prices of cow units and with the sale of ranches and value of ranches, based upon the grazing rights, etc., in the year 1951? A. I think so.

Q. And from the investigation that you have made of the Diamond S Ranch properties, did you form an opinion as to the value of the properties in Humboldt County, Nevada? A. Yes.

Q. And that was for 1951? A. Yes sir.

Q. And what was that value?

A. I thought the ranch was worth three hundred twenty thousand dollars.

Mr. Smith: That's all.

Cross Examination

Q. (By Mr. Macomber): What date did you make this appraisalment, Mr. Sewell?

(Testimony of Charles Sewell.)

A. What date, did you say?

Q. Yes.

A. It was the last three days in October, 1956. It might have been the 29th, 30th and 31st, first day of November, that period.

Q. Had you actually gone over the Diamond S Ranch between 1939 [79] and 1956?

A. I had never gone over it, been by it but never over it.

Q. When you went by, you went by about fifty-five miles an hour?

A. That is about my speed, yes.

Q. When you sent over this ranch during the latter part of October, 1956, did you see a lot of new improvements to the ranch?

A. Yes, I did.

Q. You saw six or seven new wells?

A. I saw eight wells.

Q. Pardon me?

A. I think there were eight wells.

Q. And you saw new feed mill?

A. Yes sir.

Q. And you saw new corrals?

A. Yes sir.

Q. New fences?

A. I didn't see many new fences.

Q. You saw new pipe lines?

A. You mean the pumping plant?

Q. Yes. A. I saw a pumping plant.

Q. And pipe lines?

A. Didn't see any pipe lines. Are you talking

(Testimony of Charles Sewell.)

about the pipe lines, are you referring to the sprinkler to the lands?

Q. Yes. [80] A. Yes, I saw them.

Q. And you saw new power lines?

A. Yes sir.

Q. Transformers bringing power to all these eight new wells? A. Yes sir.

Q. And do you know when those improvements were made to the ranch?

A. I couldn't know for sure what years they were made.

Q. Is it your opinion now that this ranch, as of the time you looked at it, was worth three hundred twenty thousand dollars? A. No sir.

Q. How much was it worth as of the time you looked at it?

A. My valuation I was putting on it was I thought what it was worth in 1951.

Q. You didn't know what the ranch looked like in 1951, did you?

A. Well, yes sir, generally.

Q. Was your recollection of what it looked like in 1951 based upon your recollection of what it looked like in 1939?

A. I think it looked better in 1939 really.

Q. You really didn't see that ranch between 1949 and 1956, did you?

A. Just as I was going along the road.

Q. How much of the ranch could you see going along the road? A. Quite a lot of it.

(Testimony of Charles Sewell.)

The Court: How far did that ranch stretch on the road?

A. I would say it runs along the road for six or seven miles. [81]

Q. Do you know how many cattle were on it in 1951? A. No sir.

Q. Is your appraisal based in any part upon the number of animal units the ranch would carry in 1951?

A. Based on what I thought I could run there.

Q. What you thought you could run there?

A. Yes sir.

Q. In 1951? A. Yes sir.

Q. Was your appraisal based in any respect upon how many animal units were allocated to this ranch by the Department of the Interior?

A. Yes sir.

Q. And what was that? What did you allocate? What was your thinking along that line?

A. Well, I heard you stipulate this morning 3692 AUM's, which we found in the grazing office to be the exact figure. I was basing my appraisal on running 1600 head of cattle.

Q. You think you could put 1600 head of cattle on these ranches for how long a period of time?

A. That would figure out about two and one-third months.

Q. And then you would bring the 1600 head of cattle down and feed them on the base ranch?

A. I would feed them, pasture them, yes.

Q. And the base ranch would have to produce

(Testimony of Charles Sewell.)

enough feed to [82] feed these animals for nine and one-half months? A. That is right.

Q. And you believe, from your inspection in 1938 and your driving by there between 1938 and 1956, and from your inspection in 1956, that this ranch in 1951 would have carried 1600 head?

A. Yes sir.

Q. What is the Diamond S Ranch worth at the time you examined it, so far as animal units were concerned; that is to say, would you say that ranch could be valued by placing a value upon the number of animal units the ranch could carry?

A. I don't believe I quite understand your question.

Q. Is it usual to take into consideration in appraising, that is, in buying or selling Nevada ranches, the animal carrying capacity?

A. Right.

Q. What value do you put upon a ranch, so far as that is concerned?

A. I arrive at my figure 1600 carrying capacity at two hundred dollars per animal.

Q. You arrived at your appraisal by multiplying 1600 head animal units carrying capacity——

A. That is right.

Q. ——by two hundred dollars, is that right?

A. That is right.

Q. Are you familiar with any sales of ranches recently in the [83] State of Nevada, say in this particular area?

(Testimony of Charles Sewell.)

A. I just sold the ranch at Riddle last fall, traded it for property.

Q. How much per animal unit was that sold for?
A. At one hundred fifty dollars.

Q. Are you familiar with the McIntyre Ranch east of Elko?
A. Yes sir.

Q. Do you know what that sold for?

A. No, I do not.

Q. You don't know about that sale?

A. I know it was sold; I don't know the price.

Q. Do you know if it was sold for one hundred fifty dollars per animal unit?

A. I don't know. It was divided up and sold in two or three different parcels.

Q. Do you know about the sale of the Horseshoe Ranch?
A. In Elko?

Q. That is in the vicinity of Elko.

A. Eureka County.

Q. Do you know that was sold on the basis of one hundred thirty dollars per animal unit?

A. No sir.

Q. You don't know what it sold for?

A. No.

Q. Do you know about the sale of the Hill Ranch in Star Valley? [84]

A. I know about that.

Q. What was the date of the sale?

A. I believe in the spring of 1956.

Q. Do you know the selling price of that ranch per animal unit?
A. No sir.

(Testimony of Charles Sewell.)

Q. Do you know about the sale of the Warm Springs Ranch in Clover Valley?

A. I know the ranch.

Q. Do you know the selling price of that per animal unit? A. No.

Q. Do you know about the sale of the George Ralph Ranch in Clover Valley? A. Yes.

Q. Do you know the selling price?

A. No.

Q. So you have not familiarized yourself with sales of other ranches in that vicinity, have you?

A. I am not in the real estate business.

Q. Do you know that the C.S. Ranch immediately adjoining the Diamond S Ranch is being sold by the Bullhead Cattle Company, do you know about that? A. No sir.

Q. Do you know whether in 1951 the Diamond S Ranch ever would actually carry 1600 head of cattle throughout the year? A. I think so. [85]

Q. Do you know whether there were in fact 1600 head of cattle there at that time?

A. I never counted them. I was never on the ranch to count them.

Q. Do you know whether it is customary to use those Taylor grazing rights and the leased land over the period of five months during the year instead of two and one-half months?

A. I think an operator might increase his numbers and shorten his term, or the other way around.

Q. I am asking for what is usual in Humboldt County. Do you know?

(Testimony of Charles Sewell.)

A. Usual, I don't know. Probably no two operators have the same operation.

Q. You don't think there is any usual period of time in which the—— A. No, sir.

Q. Do you know of any ranch in Humboldt County where they run their cattle two and one-half months over the entire Taylor grazing rights?

A. I think that the ranch I bought above the town of Winnemucca, I think they take their Taylor grazing in the winter time.

Q. For how long?

A. Two or three months.

Q. Do you know of any ranch in Elko County use their Taylor grazing rights for two and one-half months? [86]

A. Some ranches in Elko County don't even allow Taylor grazing at all.

Q. Isn't it a fact the ranches in Elko County, as a general rule, are considered superior to ranches of the same acreage in Humboldt County?

A. That depends on——

Mr. Smith: Objected to as irrelevant.

The Court: I don't think it is relevant, so far as the Court is concerned.

Mr. Macomber: I will withdraw the question.

The Court: I think you have demonstrated, counsel, that this witness is not, as he stated, a real estate operator. He is not here for putting on the value of sales.

Mr. Macomber: That's all.

(Testimony of Charles Sewell.)

Redirect Examination

Q. (By Mr. Smith): Mr. Sewell, in arriving at the price you did and for the year 1951, you base that upon what you thought you could operate the ranch, the way you could operate the ranch, is that correct?

A. I don't understand the first part of your question.

Q. In arriving at your value of three hundred twenty thousand dollars, you arrived at that value as to the operation of the ranch properties and what it would be worth to you if you were going to buy it and operate it?

A. I think that was a pretty common price, three hundred twenty [87] thousand dollars.

Q. In 1951? A. Yes.

Q. And of course decreased in 1951 because of the condition of the cattle industry?

A. That is right.

Q. But in arriving at the price of three hundred twenty thousand dollars, you felt the ranch, as you knew it, 1600—

Mr. Macomber: Objected to as leading and suggestive.

The Court: Objection overruled. This entire area is speculative, so far as this Court is concerned.

Mr. Smith: That is all.

Recross Examination

Q. (By Mr. Macomber): Mr. Sewell, if the

(Testimony of Charles Sewell.)

Diamond S Ranch Company actually used their Taylor grazing rights to pasture 738 animals for a period of five months and those 738 upon the best range, and fed for the rest of the year, would your answer be any different, and your appraisal?

A. No sir.

Mr. Macomber: That's all.

The Court: Mr. Sewell, based upon your experience in the livestock industry in Elko County and Idaho, based upon the fact that you were by this ranch in 1939 and again in 1956, [88] you have attempted to reconstruct a picture that will fit this ranch in 1951?

A. That's right, yes sir.

Q. And as counsel has said, this picture, then, was created on what you think you might have done had you been operating it in 1951?

A. Well, when I was there in 1938 or 1939 these people delivered the cattle and we cut the calves off and shipped them out to the Nelson Meat Company, so we were around there several days, getting these calves and I was around there several days, and as I recall, I bought the pasture and hay right from a woman, who owned the ranch at that particular time. I thought it was a pretty good ranch.

Q. You had an opportunity to examine the fields. Did they consist of irrigated pasture or did they consist of crops?

A. Most of it was wild native hay.

Q. Of course, the extent of that depends upon the——

(Testimony of Charles Sewell.)

A. Flow of the Humboldt River.

Q. Upon the river. That can vary from nothing to one hundred per cent?

A. That's right.

Q. The operating value of any property depends upon the operation and ability of the person in charge?

A. That's true, yes, very true. [89]

Q. You can make money on a spread and I couldn't.

A. Well, you could make it, I could make it too.

Q. Now in arriving at a value, based upon this two hundred dollar rule of thumb proposition, and we all realize the rules are the quick factors that we use in the livestock business, did you take into consideration the fact that certain of the AUMs were based on the leased property commensurability? A. Yes.

Q. And if those leases had been terminated, of course, some of the value would be gone?

A. That is right.

Q. In 1956, when you went upon the ranch last, could you tell whether or not the fields were devoted to irrigated pasture and wild hay or crops?

A. The Diamond S Ranch Company has done a lot of work there. They have some beautiful crops growing on there now. I saw them yesterday as I came along and I could tell all that had been put in pasture. To go back and say in 1951—

Q. What you say what was there in 1951, to me would be an impossibility, so that is one of the

(Testimony of Charles Sewell.)

points the Court had in mind. It would be rather a difficult problem for you to say in 1956 subtract all the changes and eliminate them from your mind, and operate solely on a 1951 picture, because you didn't see it in 1951. [90]

A. But it isn't as difficult as it might seem, because the land that is the new land in cultivation is growing alfalfa, parallel alongside the road. When I was there before the native hay that was there would have to take care of the stock I thought you could run there.

Q. Do you know how many cattle were actually run in 1951? A. No, I do not.

Q. Do you recall what the flow of the Humboldt was, as to decreed water, in that year, as to that ranch?

A. In 1951, lots of water in the Humboldt.

Q. Have you any recollection or knowledge as to what the ranch condition was in the area in which the grazing rights were exercised?

A. We didn't go out and actually tramp over the grazing lands.

Q. Contiguous to the ranch?

A. Just across the highway.

Q. It is a summer range?

A. Spring range I call it, better spring range.

The Court: I think that is all.

Mr. Smith: That's all.

HARLEY M. McDOWELL

a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Greenfield): State your full name, please. [91]

A. Harley M. McDowell.

Q. Where do you reside, Mr. McDowell?

A. Boise, Idaho.

Q. What business are you in?

A. In the business of ranch management, appraisals and map making.

Q. Do you have a business name?

A. I am the owner and manager of the Idaho Land & Map Service.

Q. Would you rather briefly tell your educational background, Mr. McDowell?

A. I have a Bachelor of Science degree from Colorado State College of Agriculture and work toward a Master's Degree in ranch management, land economy and associated engineering subjects from the Utah State College of Agriculture.

Q. Did there come a time in your life when you became employed by the United States Department of the Interior, Bureau of Land Management?

A. Yes, I was employed first in Elko County, Nevada.

Q. When was that?

A. That was in 1938 and 1939.

Q. What was your position at that time?

A. I worked on ranch analysis classification, ranch analysis, land classification, checked the best

(Testimony of Harley M. McDowell.)

pasture commensurability, in those days called Taylor grazing rights.

Q. That would have been throughout Elko County? [92] A. That is correct.

Q. Then following 1939 where were you employed?

A. By the Taylor Grazing Service in Idaho in approximately the same capacity, working on ranch and land appraisal, such as carrying capacity, ranch analysis, until 1946.

Q. Then from 1946 to 1950 what was your occupation?

A. I was Director of Classifications for the State of Idaho, had charge of all appraisals of all property in the State, as well as setting up land classifications, and employed some ninety to ninety-five persons under my direction at that time.

Q. Since 1950 you have been operating your own business, the Idaho Land and Map Service?

A. That is correct.

Q. Would you state a little more fully generally what services you perform, your company performs?

A. We act as consultants for some four hundred fifty ranch operators in western Wyoming, throughout the State of Idaho and northern Utah, all of Nevada and eastern Oregon and in that capacity we work on the Taylor grazing operations, ranch management plans. In addition to that we do appraisal work.

Q. Are you acquainted with the properties of

(Testimony of Harley M. McDowell.)

the Diamond S Ranch Company? A. I am.

Q. When did you first see that property?

A. 1938 and 1939, but not to be very familiar with it. [93]

Q. You were on the property, however?

A. Just by the property, wasn't on it.

Q. Just by it? A. Yes sir.

Q. Let us go back to the year 1951. During the year 1951 you were operating your Idaho Land and Map Service, and at that time were you familiar—did you become familiar—with real estate values, and in particular ranch property values, throughout southern Idaho and northern Nevada?

A. Yes, I did. We have appraised some three thousand parcels of land and I would like to refer to those two years to refresh my memory for dates as to what time I was in this area.

Q. Go ahead, but let me ask you this, did you have occasion to appraise an outfit known as the Bucknauer & Arnold Crescent Valley ranches in Eureka County? A. I did.

Q. Do you know about when that was?

A. I can tell you exactly if I refer to this.

Q. Go right ahead.

A. I appraised that property in December, 1951.

Q. About how far away is that property from the property of the Diamond S Ranch Company, approximately?

A. I believe about fifty miles, between fifty and fifty-five.

Q. And at the time you appraised the Crescent

(Testimony of Harley M. McDowell.)

Valley ranches in 1951, did you make inquiries as to prices ranches of similar [94] character were selling for?

A. I did. The Bucknauer & Arnold outfit were contemplating making quite an extensive ranch development and going into the sales problem they had some six townships and Mr. Arnold was an old land agent for Miller and Lux Company in the early days and we spent considerable time making land classifications through Battle Mountain, Paradise Valley, Quinn River and McDermitt and towards Wadsworth, checked several ranches there.

Q. Now I will ask you, Mr. McDowell, if recently you have had occasion to make detailed examination of the properties of the Diamond S Ranch Company? A. I have.

Q. When was that?

A. That was October and November, 1956. I spent some twelve days examining the ranch properties and records and all things I believed pertinent in establishing valuation.

Q. And did you come to an opinion as to the value of the Diamond S Ranch properties as of 1951? A. I did.

Q. Based upon your experience, extensive experience, in appraising real ranch properties throughout this western area for many years, based upon your examination and study of the Diamond S Ranch properties in 1956, what is your opinion of the value, the fair market value, of these properties in 1951?

(Testimony of Harley M. McDowell.)

Mr. Halley: May I ask some questions on voir dire? [95]

The Court: You may.

Voir Dire Examination

Q. (By Mr. Halley): Mr. McDowell, did you check sales of ranches made in Humboldt County, Nevada in 1951?

A. I have sales of ranches which I feel——

Q. Answer the question — did you check sales that were made in Humboldt County of ranches in 1951?

A. I did not.

Q. Did you check sales of any ranches that were contiguous to the Diamond S Ranch that were made in 1951?

A. I did not.

Q. Did you make examination of the Diamond S Ranch in 1951?

A. Not for appraisal purposes.

Q. I believe you said you first saw the ranch in 1938 or 1939 and you merely drove by it?

A. That is correct.

Q. You did not examine it to determine the extent of it or carrying capacity or condition it might be in?

A. Not until 1951.

Q. In 1951 did you examine the ranch to determine its condition?

A. No, the only examination I made in 1951 was in connection with the McCleary property and Bullhead.

Q. And you examined Bullhead?

A. I examined Bullhead at that time just to

(Testimony of Harley M. McDowell.)

obtain the general carrying capacity and general ranch conditions. [96]

Q. But Bullhead was not for sale in 1951?

A. No.

Q. Were any of the McCleary properties for sale in 1951?

A. No. He purchased the Reborse Ranch, but it was before that time.

Q. Prior to 1951? A. Yes.

Q. Was that over on the Little Humboldt?

A. That would be in Paradise Valley, which would be adjacent to this area.

Q. Paradise is on the Little Humboldt?

A. Well, that is correct.

Q. This ranch is on the Big Humboldt?

A. That is correct.

The Court: The Court will take judicial notice.

A. I might say, your Honor, I am familiar with the McCleary properties. I have studied those properties in detail for carrying capacity. I know how they compare with these properties.

Q. Do you know when this Diamond S Ranch was last sold?

A. I do not, but from the records I believe I could tell you. The record I have here, when it was formerly the Stall ranch and I understand the Diamond S Corporation since 1945, but I am not familiar with the history prior to that time.

Q. You are not familiar with the last sale of this particular ranch? [97]

A. I am not. I might explain here in my opin-

(Testimony of Harley M. McDowell.)

ion individual characteristics of the ranch, carrying capacities, improvements and location varies the value, that is what we are interested in selling, that is what it is worth.

Mr. Halley: I think the Court might tell you the comparative sales are considered in law the best evidence.

Mr. Greenfield: Just a moment—it seems to me this has developed into general cross-examination. This is voir dire, there should be some limitation.

The Court: Have you concluded your voir dire?

Mr. Halley: No, your Honor.

Q. You say you took into consideration the condition of the property? A. I did.

Q. And also its carrying capacity?

A. I did.

Q. In 1951 you did not know the condition of the Diamond S Ranch?

A. I have an opinion as to the condition.

Q. You didn't know, though, what the condition was?

A. I can only tell you from the inspection I made at that time, which was general. I do not have specific knowledge of all the conditions.

Q. I understand, Mr. McDowell, that you did not make an examination [98] of this ranch in 1951? A. I did not.

Q. And prior to that time you saw it in 1938 or 1939, but you did not examine it, merely went by? A. That is correct.

Q. So you do not know its condition in 1951,

(Testimony of Harley M. McDowell.)

you don't have actual knowledge of its condition in 1951?

A. I believe in that respect you don't have to examine a ranch for appraisal purposes to know its general conditions. You can drive by or through a ranch, you can tell the general condition very easily.

Q. Then I understand you are going to base your opinion, in answering the question on the condition of the ranch in 1951 and the condition as you now describe it, not knowing it actually, but just driving by it, is that right? A. No, sir.

Q. You are going to take into consideration the condition of the ranch in 1951?

A. I am to my best knowledge, yes, and to records I have available.

Mr. Halley: We object to the offer on the grounds the witness is not qualified to answer, by his own admission here that he bases his appraisal in part upon the condition of the property, and certainly this witness has demonstrated he has no knowledge of the condition of this ranch other than he saw [99] passing by on the highway.

The Court: Well, counsel, expert witnesses are admittedly favored in law. Perhaps that is as it should be. I don't know as there is an objection. The Court at this time will give the testimony such weight as it feels proper.

Examination Continued

Q. (By Mr. Greenfield): Mr. McDowell, will

(Testimony of Harley M. McDowell.)

you then state what, in your opinion, was the fair market value of the Diamond S Ranch property in 1951? A. In my opinion——

The Court: May the Court make a comment? I think this witness has demonstrated he doesn't know what the fair market value is. I think that is obvious. That is what you are trying to bring out. He has said he is not arriving at his opinion directed toward the fair market value, but as a value which he places upon it upon the basis of his own peculiar technical knowledge.

Mr. Greenfield: If the Court please, I would like to inquire a little more on this.

The Court: You may.

Q. Mr. McDowell, have you done any appraisal work for condemnation [100] purposes?

A. Yes, I have.

Q. What is your understanding of the meaning of the term fair market value?

A. It is the price the property would sell for to a willing buyer who was not forced to buy, by a seller who was not forced to sell. Now I would like to make one correction in my testimony here. I stated in court I did not base my testimony entirely on comparative sales, but I made a misstatement.

The Court: And perhaps the Court is off on the wrong track. This witness said he was not familiar with ranch sales.

A. Your Honor, as I tried to explain here, I

(Testimony of Harley M. McDowell.)

do have comparative sales of ranches, but not in Humboldt County.

Q. Let me come to that. As I understand it, you, in 1951, while appraising the Bucknauer & Arnold Crescent Valley ranches, had occasion to, and did, discover the selling price of comparative ranch property in northern Nevada and southern Idaho? A. I did, yes.

Q. Where were these properties located with respect to Humboldt County? Were they remote or were they reasonably close?

A. They would be within a radius of—I think the ranching conditions would be very similar and comparable.

Q. That is what I want to know.

Mr. Halley: I move to strike the answer as not being [101] responsive to the question.

Mr. Greenfield: I think that is a subject of general cross-examination when Mr. Halley comes to it.

The Court: It is responsive in a limited manner, but you might have further questions. Have the witness translate that into miles.

Q. How far away were these comparable properties you are talking about, Mr. McDowell?

A. Within a radius of eighty-five to ninety miles.

Q. Now I would like again to ask you one other question. I think you said—and perhaps you confused the Court—that when you stated that you didn't consider comparable sales being the sole basis upon which to arrive at your basis, you said

(Testimony of Harley M. McDowell.)

that you took into account the peculiar and personal characteristics of the property you are appraising, so when you get all through taking into account the personal characteristics of the property and the comparable sales and all the other elements you testified to, do you come up, and in this instance did you come up, with an opinion as to the fair market value? A. I did.

Q. Now what is your opinion as to the fair market value of this property in 1951?

Mr. Halley: I would just like to ask a further question on voir dire before he answers, in line with what counsel has developed here.

The Court: Well, I think it is covered, but go ahead. [102]

Voir Dire Examination

Q. (By Mr. Halley): Mr. McDowell, when you say you are familiar with comparable properties as they existed in 1951, they were within a radius of eighty-five to ninety miles of this property, is that true? A. That is right.

Q. And those properties were in Elko County?

A. No, a part in Humboldt, the Quinn River and McDermitt area, that vicinity.

Q. Isn't it a fact Elko properties, ranches, are considered more ideal properties than any properties on the river?

A. I think some of your Elko ranches would sell for more. Some probably sold for comparable—again it is the individual ranch. You can't say one area is superior to another.

(Testimony of Harley M. McDowell.)

Q. You also say you take into consideration the personal characteristics of the property, is that true? A. Yes.

Q. And you take into consideration comparable sales which are indicative of them?

A. Correct.

Q. Now the comparable sales you have in mind are the ones in Elko County?

A. No, not Elko County alone. I still have Humboldt, actually in Malheur County, Oregon, one would be in Humboldt County, right on the Oregon line.

Q. How far from this ranch? [103]

A. At McDermitt.

Q. How far from this ranch?

A. Within eighty-five miles.

Q. At the top of the creek too, wasn't it?

A. No, not entirely at the top.

Q. More or less though?

A. More or less.

Q. Now you are familiar with the personal characteristics of those properties too?

A. I am familiar with the carrying capacity of the properties and factors that go to make up values.

Q. Still in 1951 you did not have actual knowledge of the personal characteristics of the Diamond S Ranch?

A. I have personal knowledge of the basic factors to make up values.

(Testimony of Harley M. McDowell.)

Q. But you did not inspect the ranch for personal characteristics in 1951, is that right?

A. I examined it several times. I did not for any value.

The Court: How long were you on the ranch?

A. I imagine thirty minutes. We drove from the highway down the line, direct across the river and turned around and had a chance to see the buildings and property on the western side, turned around and drove back up to the town of Golconda, then drove down the full length of the ranch along the highway, which gives you a good inspection of the whole property. [104]

The Court: That is the way I inspect mining property, in my amateur way.

A. Had I inspected for appraisal, I would have taken several days.

The Court: I think we will take our afternoon recess. We will be in recess until 3:15.

(Recess taken at 3:00 o'clock.)

3:15 P.M.

The Court: Any further questions, Mr. Halley?

Mr. Halley: We renew our objection.

The Court: That objection was to this witness testifying to the fair market value?

Mr. Halley: Yes, your Honor, giving his opinion as to the fair market value.

The Court: Objection overruled.

Direct Examination—(Resumed)

Q. (By Mr. Greenfield): Now, Mr. McDowell,

(Testimony of Harley M. McDowell.)

in preparing your appraisal of this ranch, did you prepare personally a map of the properties?

A. I did.

Q. Mr. McDowell, showing you plaintiffs' Exhibit No. 2-P, I will ask you if that is the map which you prepared? A. It is.

Mr. Greenfield: We offer the map in evidence, your Honor.

Mr. Halley: May we see it, your Honor? May we ask a [105] few questions?

The Court: Yes, you may.

Examination

Q. (By Mr. Halley): Mr. McDowell, when was this map prepared? A. December, 1956.

Q. That was after the examination you made in October and November, 1956? A. Yes, sir.

Q. And does this depict the conditions as you found them at that time? A. Yes, sir.

Q. It does not purport to depict the condition that existed at the ranch in 1951, is that true?

A. It does not. I have made allowances on my appraisal to take that into consideration.

Q. However, the ranch is as it existed in 1956 rather than 1951? A. That is correct.

Mr. Halley: We object to the offer, your Honor, as entirely too remote and would not tend to prove any of the issues in this case. Entirely incompetent.

The Court: It is evidently an agricultural map?

A. Yes, sir.

(Testimony of Harley M. McDowell.)

Mr. Halley: There is evidence here there have been tremendous improvements on that property since 1951, as shown by Mr. Sewell's testimony.

The Court: Does this map show the principal area of the holdings involved here?

A. It does.

Mr. Greenfield: If the Court please, I suggest the map is of value to the Court for the purposes of illustration, if nothing else, with the understanding that it does not reflect changes since 1951, of whatever value the Court finds it to be.

The Court: With that statement, the map is admitted in evidence, for the limited purpose of illustration only, having in mind that it does not attempt to show the agricultural status of the holdings in 1951. Do you have any objection to that?

Mr. Halley: No, your Honor, for illustrative purposes only.

Examination—(Resumed)

Q. (By Mr. Greenfield): Mr. McDowell, in arriving at your appraisal of the property, as you have testified, did you prepare a written breakdown, typewritten breakdown, in detail of your valuation of the property, parcel by parcel?

A. I did.

Q. Showing you what has been marked for identification as plaintiffs' Exhibit 3-P, will you state whether or not that is a true copy of your detailed breakdown appraisal? A. That is. [107]

Mr. Greenfield: We offer this in evidence, your Honor, as plaintiffs' Exhibit 3-P.

(Testimony of Harley M. McDowell.)

Mr. Halley: May we see it. If the Court please, we object to the offer, first, on the ground attached to the appraisal are many exhibits, which certainly are not evidence—letters from, as I understand, the District Grazier, for instance, letters directed to the District Grazier by Robert M. Leonard, whoever he may be, many items in there that are purely hearsay statements and probably self-serving. We haven't had time to examine them. The appraisal itself is self-serving.

Mr. Greenfield: When the Court has completed its examination of the exhibit, I would appreciate an opportunity to comment.

The Court: In relation to your objection that it is hearsay, the Court points out all those matters will be considered by the Court in weighing the offer. Perhaps the exhibit indicates a considerable portion of hearsay. It may be more valuable to the defendant than to the plaintiff. Do you wish to make some comment, counsel?

Mr. Greenfield: I think not, your Honor.

The Court: Perhaps the Court shouldn't talk so much. The Court is of the opinion that the appraisal, so far as it goes, being represented by [108] plaintiffs' Exhibit 3-P, is admissible, in support of the opinion given as to the fair market value, and certainly is material to the extent that it gives the Court some idea as to how the witness went about, the mechanical process of appraising. Objection overruled. The offer is admitted in evidence as plaintiffs' Exhibit 3-P.

(Testimony of Harley M. McDowell.)

Mr. Greenfield: Defendants may cross-examine.

Cross Examination

Q. (By Mr. Halley): Mr. McDowell, in your opinion is there anything peculiar about the Diamond S Ranch that is any different from any other ranch in that area?

A. I feel it is. It is quite a well balanced property and it is different from some other ranches in that it has a higher percentage of private land and the major portion of pasture is deeded lands being dependent upon the Taylor grazing and outside range. It has an excellent location with reference to the highway and rail head and has a high potential for development of underground water. It has a well balanced set of improvements. It has exceptional possibilities to build a feeding operation and a ranch livestock operation. It has capabilities in soil and irrigation facilities that would make a potential diversified crop farm.

Q. Do you know whether this property was ever adapted to a [109] feeding outfit?

A. I know from the facilities in place they have used it for that purpose.

Q. Do you know if that was the case in 1951 and prior thereto? A. I do not.

Q. Do you know if underground water were developed in 1951 or prior thereto?

A. To my best knowledge there were two wells at that time.

Q. In 1951? A. Yes, sir.

(Testimony of Harley M. McDowell.)

Q. Now there are how many?

A. I believe eight or nine. I can tell you exactly by examining the report.

Q. The range depends a lot upon leased land, does it not?

A. The actual federal range privileges that are dependent upon leased lands are only eighty-four AUMs.

Q. Isn't it a fact that over thirty per cent of the AUMs are public domain?

A. Yes, but 1536 of those AUMs are dependent upon the ranch proper, not leased lands.

Q. In other words, the ranch is the base property for those 1530? A. 1536.

Q. How many AUMs on the leased land?

A. Eighty-four on the federal range. [110]

Q. I mean lands leased from the railroad?

A. Carrying capacity on the railroad lands?

Q. Yes.

A. On the Diamond S deeded lands 235 AUMs, that is upon the ranch land, then on the leased land would be 1837.

Q. That is on lands owned by the Southern Pacific Railroad? A. That is correct.

Q. And also property owned by Millem?

A. Yes.

Q. And they are subject to lease?

A. That is correct.

Q. Did you make inquiry concerning the leases?

A. I did. I made a thorough investigation of them.

(Testimony of Harley M. McDowell.)

Q. Did you check with Millem and determine whether the lease was for more than a year?

A. No, but I saw a copy of the lease filed in the grazing office at Winnemucca.

Q. Only for a year? A. That is true.

Q. Isn't that true of all the Southern Pacific land? A. That is correct.

Q. So the use of those lands from year to year is dependent entirely upon renewing those leases, is that not true?

A. I believe that is true.

Q. In your examination in the Bureau of Land Management office [111] in Winnemucca, it disclosed, did it not, Mr. McDowell, that since the year 1950 the use of the federal range runs from April 1st to August 31st? A. Correct.

Q. That is for one thousand?

A. Thirty per cent.

Q. Fifteen hundred seven AUMs?

A. Correct.

Q. For five months, 4-1 to 8-31?

A. That is right. I might state if the Diamond S had applied for the full 3692 it would have been granted. They didn't, they used their range.

Q. Whereas in 1951 they had 1507 AUMs on federal ranges?

A. They were utilizing that many but still had dependence for use on the federal range, especially in good weather, for 1771.

Q. I show you defendants' Exhibit F, admitted in evidence here by stipulation, dated July 7, 1950,

(Testimony of Harley M. McDowell.)

signed by Mr.—. He was head of the office, was he not? A. Yes.

Q. And he said that the estimated carrying capacity of the federal range was in one instance 1536 AUMs and in another 84 AUMs?

A. That is right.

Q. And the carrying capacity of the leased lands was 235 AUMs in one case and 1837 in the other?

A. Yes, that is what I am testifying to. [112]

Q. In making your appraisal, were you accompanied by Mr. Sewell? A. Part of the time.

Q. And Mr. Utter? A. Part of the time.

Q. Did you three, in making the inspection, discuss the several properties?

A. We discussed the properties but we did not discuss valuations.

Q. You discussed carrying capacity?

A. We discussed carrying capacity.

Q. You discussed the condition of the properties?

A. Yes, discussed the condition and management.

Q. Did you discuss the condition as you then found it?

A. Discussed condition as of that time and prior time.

Q. Did you discuss the condition as it existed in 1951?

A. I don't recall, most likely did.

Q. The fact of the matter is, Mr. McDowell, you didn't know the condition in 1951?

(Testimony of Harley M. McDowell.)

A. I didn't know, only the testimony I heard.

Q. But you, yourself, didn't actually know the condition in 1951?

A. I have an opinion of the condition in 1951.

Q. You have an opinion, but you don't have the actual knowledge?

A. The knowledge was satisfactory to me.

Q. Satisfactory to you? A. Yes, sir. [113]

Q. Did you all agree on the carrying capacity?

A. I don't recall that we did or didn't. I would rather stand on the facts that are in my report. That is my statement and as to what they thought, I don't have a remembrance.

Q. You were in court when Mr. Sewell testified?

A. Yes.

Q. Did you agree with the carrying capacity?

A. I feel on an actual breakdown basis in 1951 the property would carry 1700 head.

Q. Do you know, as a fact, how many cattle were on the property in 1951? A. I do not.

Q. Now if you knew that there were six hundred head of cattle on the property in 1951, that they were on the range for five months and then before the year was out had to be shipped out because feed was all gone, would that change your opinion? A. It would not.

Q. It wouldn't change your opinion?

A. No, sir.

Q. I think on direct examination you gave your understanding of what market value was, a situation where a willing buyer, not required to buy,

(Testimony of Harley M. McDowell.)

would buy from a willing seller, not required to sell, is that correct? A. Correct.

Q. Is there any other information to add affecting all the [114] conditions and circumstances concerning the property?

A. As I recall, there may be some statement—I have always just used the definition I defined to you.

Q. You have never taken into consideration the fact that each of them would know all the circumstances and conditions concerning the property involved?

A. I have always assumed that if a person is willing to buy and not forced to buy and willing to sell and not forced to sell, they know those conditions before they reach that situation.

Q. Do you take that into consideration?

A. In that respect.

Q. When were you engaged by the plaintiffs in this case to make this appraisal?

A. Actually in August of 1956.

Q. You have certain fees that you charge, do you not? A. I expect to get paid.

Q. By the plaintiff? A. Yes.

Q. To what extent, Mr. McDowell, has this ranch been improved since 1951 through October, 1956, when you made your inspection?

Q. Would you please state the dates again?

Q. 1951 to the time of your inspection in October and November of '56?

A. In my opinion, the feed grinding and feed

(Testimony of Harley M. McDowell.)

yards operation has been little improved upon. There has been investment there. [115] One major item on my report, 930 acres of limited irrigation agricultural land I valued this at thirty dollars an acre. Actually today that land is probably worth one hundred fifty or even more, because of the wells, etc. that have been placed upon it, but I only valued it at thirty dollars at that time, due to limited irrigation facilities and potential water on the land would raise the valuation of the property today. I don't think it would raise it as much as Mr. Wahyou said, to a million dollars, but I feel it would raise it another one hundred fifty thousand dollars. I try to estimate where I know the developments were made. I have made my valuation conservative for that reason.

Q. In other words, you have attempted to take yourself back to 1951? A. Yes, sir.

Q. On what you could determine were new improvements? A. Yes, sir.

Q. That is merely a guess, is it not?

A. Appraisal isn't an exact science. I wouldn't like to say it is a guess, but it is my best estimate. I even checked the old water record and beneficial use and they show grain, alfalfa, a lot of cultivation and acreage in cultivation at that time and shows the potentiality has always been there many years before 1951, and if it wasn't carried through, I can't say that is the fault of the ranch, would depreciate the value [116] of the ranch. Management doesn't entirely obliterate valuation.

(Testimony of Harley M. McDowell.)

Q. You say you are not familiar with the price it sold for at the last sale? A. I am not.

Q. If you know that this ranch sold for one hundred thousand dollars in 1945, would that change your opinion?

A. No, I believe not. I know what ranches of this type were selling for at the time and to use the rule of thumb we have here, the valuation I placed is actually below the average, so I believe the valuation is a fair estimate.

Q. That is a going concern value?

A. That is the value I think a willing buyer would buy and a willing seller sell.

Q. And in pretty good condition, ditches kept up, fences kept up, things of that nature?

A. For what I think would be a normal condition for the ranch to carry livestock.

Q. So in arriving at your valuation in 1951, you assume this ranch was in normal condition at that time?

A. As I mentioned before, I have in several instances depreciated the value because I do not think it was in as high a state of cultivation as it is at this time and I believe the valuations I put on there I placed from all the records I have gone over and grazing and water records, all the old water photographs, which show exactly what was there in 1951. The [117] photographs speak very clearly. To my best estimate, that opinion of valuation, this report, portrays my presumption.

(Testimony of Harley M. McDowell.)

Q. Are you acquainted with Mr. Wisecarver's appraisal?

A. Yes, I had an opportunity to see that just recently.

Q. Did you examine that before you came here?

A. No, I didn't. My report, I believe, is last December and I did not see this until last week. I would say it is more liberal than my report. I did not allow as high a valuation as he did.

Q. You think he was too liberal?

A. Well, I don't know as he is. Probably he is correct.

Q. You say it can't be an exact science?

A. No, he is higher than I am and Mr. Wahyou is higher than he is.

Mr. Halley: That is all, your Honor.

Mr. Greenfield: No further questions.

The Court: The fact that in 1956 there were twenty acres of new cultivated land, would that, standing alone, make it any more valuable, except for certain mechanical factors? There are innumerable factors that are pretty nebulous in character that go into any of these appraisals, either made by you as an expert or possibly a lay person.

A. I consider this ranch, having been improved more recently, [118] more agriculture, it might bring in less than in 1951 as a strict livestock ranch. I have seen more livestock outfits go broke by converting.

The Court: Well, that has been the Court's misfortune.

(Witness excused.)

JACK UTTER

a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Greenfield): Will you state your full name, Mr. Utter? A. Jack Utter.

Q. Where do you reside? A. Reno.

Q. How long have you lived in Reno?

A. Two years. It will be two years in September.

Q. What business are you in?

A. Real estate business.

Q. Was there a time, before you came to live in Reno, that you lived in Winnemucca, Humboldt County?

A. I lived in Paradise Valley, Humboldt County since July, 1947.

Q. From 1947 until when?

A. Two years in September.

Q. Until 1955? A. That is right.

Q. While you were residing in Paradise Valley in Humboldt [119] County, what was your occupation? A. I was a rancher.

Q. Are you acquainted, have you been acquainted over the years, with the properties of the Diamond S Ranch Company? A. Yes, sir.

Q. When did you first become acquainted with those properties? A. In 1950.

Q. How far are they from your place?

A. About twenty miles.

Q. Now in 1951 did you dispose of your prop-

(Testimony of Jack Utter.)

erty in Paradise Valley? A. Yes, I did.

Q. At the time you sold, did you have occasion to become acquainted with the selling price, market value, of properties in that area?

A. Yes, I did.

Q. Now directing your attention to November of 1956, in the company of Harley McDowell and Charles Sewell, did you go upon the Diamond S Ranch Company properties and make a detailed investigation of the properties? A. Yes, I did.

Q. Did you arrive at an appraisal of the fair market value of the property as of 1951?

A. Yes, I did.

Q. Mr. Utter, based upon your experience as a real estate man, [120] your experience as a rancher, living twenty miles from the Diamond S properties in 1951, based upon your knowledge of ranch property values in 1951 in the area, will you state what, in your opinion, was the fair market value of the Diamond S Ranch Company properties in 1951?

A. In my appraisal I stated I thought it was worth three hundred and fifty thousand dollars.

Q. In the process of arriving at your appraisal of these properties, Mr. Utter, did you prepare a typewritten detailed breakdown analysis of the properties? A. Yes, I did.

Q. Showing you plaintiffs' Exhibit for identification No. 4-P, I will ask you if that is your detailed appraisal breakdown? A. Yes.

(Testimony of Jack Utter.)

Mr. Greenfield: We offer plaintiffs' Exhibit 4-P for identification in evidence.

The Court: The offer is received in evidence and marked plaintiffs' Exhibit 4-P.

Mr. Greenfield: You may cross-examine.

Cross Examination

Q. (By Mr. Macomber): Mr. Utter, were you on the Diamond S Ranch in 1950?

A. Yes, I was on the ranch in 1950.

Q. Do you recall much about it?

Q. A. No. I went there with Mr. Fulwider, and as far as going out on the ranch, I didn't.

Q. There were no cattle that you saw on the ranch in 1950, were there?

A. I don't recall. I don't recall if there were any cattle there at that time or not.

Q. In 1951 were you on the Diamond S Ranch?

A. Yes, I was.

Q. Do you recall cattle on the ranch at that time? A. Yes, I do.

Q. Do you know about how many head were there? A. No, I don't.

Q. If there were approximately six hundred head of cattle on that ranch in 1951 and they consumed all the feed on the ranch for a period of five months, would your appraisal be any different?

A. I would say if six hundred head of cattle ate all the feed in five months, it was poor management on the ranch.

Q. Would your appraisal be any different?

(Testimony of Jack Utter.)

A. No, it wouldn't.

Q. What did you sell your ranch for in 1951?

A. You mean in dollars and cents?

Q. Yes.

A. One hundred forty thousand dollars.

Q. How much of that was attributable to real property and improvements and how much to other things?

A. It was broken down ninety thousand dollars to real property. [122]

Q. Plus the improvements?

A. Plus the improvements.

Q. What was the carrying capacity of your ranch? A. Three hundred eighteen head.

Q. What rights did you have, so far as Taylor grazing range?

A. Three hundred fifty head right.

Q. For how many months?

A. Two and one-half months.

Q. When you made the appraisal of the Diamond S Ranch last fall, you discovered that they had rights for a five-month period?

A. That's right.

Q. And they had a total of 3692 AUMs altogether? A. That's right.

Q. Of which 1771 AUMs were attributable to federal range, 1921 AUMs to private lands, including the Southern Pacific lands? A. Yes.

Q. And so that if you carried cattle on there for the five month period, they were licensed to carry 738 head?

(Testimony of Jack Utter.)

A. I do not believe, in my own personal opinion, the range that goes with this Diamond S Ranch is worth very much. I do not believe they could operate that many cattle on the range itself. I think they have a right out there that they can turn a few cattle out while their water is on the meadows or different places that is a low range and it dries up awfully [123] early.

Q. You take a dim view of the federal range and leased land?

A. Yes, I do not believe it is worth very much to the ranch.

Q. So that most of the value of the ranch is what cattle they can feed on the ranch itself?

A. That is right.

Q. Did you notice in 1951 the ditches all broken down?

A. No, but I did notice they had a beautiful crop of alfalfa.

Q. In 1951 how many acres of alfalfa did they have?

A. I couldn't say. I don't know, but I would say one of the best crops of alfalfa in that part of Nevada.

Q. You don't know how many acres they had?

A. No, I do not.

Q. Did you notice that the alfalfa was irrigated from the ditch coming from the dam?

A. I think it was irrigated, yes.

Q. And also from waters coming down from Cold Creek?

(Testimony of Jack Utter.)

A. Yes, had an awfully good year that year.

Q. There was good water here?

A. Yes, wonderful.

Q. Did you also notice in 1951 that the balance of the ranch, outside of the alfalfa, they couldn't irrigate it because of the condition of the ditches?

A. No, I did not.

Q. Would you say that was not a fact, or you just didn't [124] notice?

A. I just didn't notice. I wasn't there for that purpose; I couldn't say.

Q. Were you in court this morning when Mr. Nutting was testifying about the condition of the ranch?

A. I was not.

Q. Did you have any federal grazing rights in connection with the ranch that you owned and sold?

A. Yes, I had Taylor grazing rights.

Q. And was it your experience on your own ranch that those Taylor grazing rights were not worth very much?

A. My rights were very good.

Q. They were very good?

A. Yes.

Q. How many AUMs did you have altogether, including federal land and any other land that you leased?

A. I just had the federal land.

Q. You didn't lease any?

A. No. I ranged in common with several other ranchers.

Q. How many AUMs did you have?

A. Right off-hand I don't remember.

(Testimony of Jack Utter.)

Q. Well, three hundred fifty for two and one-half, do you think?

A. That is what it would be.

Q. That would be 875 AUMs?

A. Something like that, yes. I sold that ranch in 1951 and bought another at the same time I sold that one, a permit of [125] 378 and I paid one hundred forty thousand dollars for that, including the cattle, value of fifty thousand dollars.

Q. In your appraisal you value the Taylor grazing rights on federal land at eight dollars an AUM? A. That is right.

Q. How did you arrive at that?

A. Well, the way I arrived at it, your value of the land from three dollars on the desert to fifteen to twenty dollars. I think perhaps that this Taylor grazing land connected with the Diamond S Ranch in certain years is worth that to the ranch. Every year they have a good year, they can turn out and utilize that feed. I believe for five months that is cheap for grazing land.

Q. That is for 'five-months' period?

A. Yes.

Q. Did you base your appraisal on so much per animal unit carrying capacity?

A. Yes, I have.

Q. What do you figure?

A. I figured about fifteen hundred head and I figured it looked to me it went more to a feeder set-up than a cow and cattle operation.

(Testimony of Jack Utter.)

Q. So you figured fifteen hundred head at two hundred dollars a head?

A. I figured a little higher than that and Mr. McDowell figured [126] lower, but I don't think in my appraisal I figured fifteen hundred head at the most.

Q. And how much a head did you figure?

A. About two hundred twenty to two hundred twenty-five dollars.

Q. Do you know whether this ranch actually did in 1951 carry fifteen head?

A. I can't say.

Q. Do you know whether it could have carried it in the condition it was in, that is, fifteen head all year around?

A. I couldn't say.

Q. You have made your appraisal on the basis that you thought you could make it run fifteen hundred head, is that about it?

A. That is what I thought.

Q. Have you ever run fifteen hundred head of cattle?

A. Yes, I have.

Q. On what ranch?

A. I had three ranches.

Q. Do you have them now?

A. No, I haven't. I finished up last month.

Q. And if you should learn that this ranch would not carry fifteen hundred head, it would make no difference in your appraisal?

A. Yes, it would.

Q. If it carried only six hundred head for a period of five months in 1951 and all the feed was

(Testimony of Jack Utter.)

consumed, would that make [127] a difference to you in your appraisal?

A. I believe there were more cattle on there than six hundred in 1951.

Q. Do you know how many head there were?

A. No, I don't but I think there were a lot of cattle shipped in there. I can't recall whether '50 or '51.

Q. But you don't know how many?

A. I don't know how many. That ranch, what I have seen of it, should carry fifteen head of cattle easy.

Q. Do you know of any year, in 1951 or any time prior to 1951, when this ranch did carry 15—head all year around?

A. Well, I couldn't say how many; I can't tell you I have seen it carry fifteen hundred head.

Q. Has the price of ranches gone up or down since 1951, based on the AUMs?

A. I find that today that real estate values have not changed very much, although the cattle market is down to what it was in 1951. It seems like these real estate values are holding up.

Q. So they are about the same today as in 1951?

A. I would say so.

Q. Are you familiar with sales that have been made in the vicinity of the Diamond S Ranch in the past few years?

A. No, I am not. [128]

Q. Are you familiar with the sale of the Baldwin Ranch, the Horseshoe Ranch?

A. I know where it is.

(Testimony of Jack Utter.)

Q. Do you know that that was based on a selling price of one hundred thirty dollars an animal unit?

Mr. Greenfield: If the Court please, I think it is improper for counsel to persist in asking questions based on facts not in evidence. I have no objection to having him ask how much the ranch sold for, if he knows. I think it is irrelevant and immaterial, not based on the evidence.

The Court: Of course, the examination can't be on facts not in the record, but it serves its purpose to ascertain from this man to testify as an expert whether or not he knows the facts of sales.

Mr. Greenfield: I have no objection at all to having him ask if he knows what the facts were about sales of various properties, but I do feel he should not continue to put it as though it were in evidence. No objection to having him ask how much the ranch sold for, if he knows.

Mr. Macomber: That is all I am asking.

The Court: I think that is admissible.

A. I don't know.

Q. Do you have the CS Ranch, Bullhead Ranch, adjoining the Diamond S Ranch, listed with you for sale now? [129] A. Yes, I do.

Q. What are they asking for that ranch, what is the asking price?

A. Five hundred seventy-five thousand dollars.

Q. What is the carrying capacity of that ranch?

A. Three thousand head.

Q. Isn't it three thousand five hundred?

(Testimony of Jack Utter.)

A. I think, as close as I can check out the Taylor Grazing Act permits, it is maybe a little over three thousand.

Q. How much of this price is attributable to something other than the ranch and its improvements? A. That again I can't say.

Q. You don't have that with you?

A. I do not.

Q. Isn't it a fact that the asking price of the CS Ranch is approximately one hundred thirty-five dollars per animal unit for the ranch itself?

A. I can't recall, but I believe it is a little higher than that. I think we figured that out with Mr. Wallace approximately one hundred sixty-five dollars.

Q. That is your recollection right now?

A. I believe somewhere in there, one hundred sixty-five we figured. I don't recall.

Q. Have you sold some ranches in Humboldt County recently, the last few years? [130]

A. Yes, I have.

Q. Name one. A. The Lye Ranch.

Q. Was that sold on the basis of so much per animal unit?

A. It was not. The whole ranch at a price.

Q. Did you figure the selling price of that based on animal units so far as the ranch itself?

A. I bought it and sold it.

Q. Did it have cattle on it? A. Yes, it did.

Q. Did you sell it with the cattle?

(Testimony of Jack Utter.)

A. Yes, bought it with cattle and sold it with cattle.

Q. When you sold it, did you break it down?

A. No, I did not.

Q. Not at all? A. No.

Q. Are you familiar with the sale of the McIntyre Ranch east of Elko? A. I am not.

Q. Were you familiar with the sale of the Hill Ranch in Star Valley? A. No.

Q. Were you familiar with the sale of the Warm Springs Ranch in Clover Valley?

A. No, I am not. [131]

Q. Is it your experience that Elko County ranches are generally worth more than Humboldt County ranches?

A. Well, I would say no. I had a ranch in Humboldt County. I believe the ranches in Humboldt County are as good as in Elko County.

Q. Based on this animal unit rule of thumb, what is your opinion as to what the value of the ranch is at the present time?

A. I don't believe you can value and compare one ranch with another—all the facts that enter into it, location and range, what type of range it has and how many cattle it will run along with the animal unit, and I don't see how you can compare one ranch with another.

Q. Is there anything unusual about the Diamond S Ranch that would make it worth more money than any other ranch?

A. It has an ideal location. Has a good water

(Testimony of Jack Utter.)

right; it is close to the highway, close to the railroad. I believe it is ideally located for a ranch.

Q. Is there anything else about it that is special, different from any cattle ranch?

A. I would say not.

Q. The circumstances you have just stated could be observed by any one who wanted to buy the ranch? A. I think so.

Q. You based your appraisalment in part by taking the land and fixing values per acre on land that has the condition this has, [132] is that right?

A. That's right.

Q. And you have taken the irrigated crop land, put a value of one hundred fifty dollars per acre upon it? A. That's right.

Q. And estimated the native hay pasture meadows at one hundred dollars an acres? Do you think those values are reasonable values in 1951 for this ranch?

A. I think so. I do not think there is a rancher in the northern part of the country that would pay one hundred fifty dollars for alfalfa land.

Q. Do you know there was seven hundred sixty-seven acres of irrigated crop land planted to corn in 1951? A. No, I do not.

Q. So if there were not that many acres, your appraisal is based then upon what you thought it could be developed into?

A. Mr. Sewell and Mr. McDowell and myself went over the water right. They had a water right at one time there were seven hundred sixty-

(Testimony of Jack Utter.)

seven acres of land under cultivation and I believe it could have been at that time. Whether it was or not, I do not know.

Q. So I assume your appraisal is based upon your appraisal what they could have done?

A. That is right.

Q. Or what you could have done with the ranch?

A. I will say yes.

Mr. Macomber: That is all.

Mr. Greenfield: That is all.

The Court: You may be excused, sir.

Mr. Greenfield: If the Court please, there are several depositions that we would like to offer.

The Court: What are they?

Mr. Greenfield: Well, there is Sam Wahyou's deposition in 1956.

Mr. Macomber: I will stipulate that may be admitted.

The Court: Through stipulation, the deposition of Sam Wahyou, dated October 20, 1956, is admitted in evidence. It may be opened and published.

Clerk: Plaintiffs' Exhibit 5-P.

[See page 151.]

The Court: Other than the Wahyou deposition, I think all the rest were admitted at the pre-trial.

Mr. Greenfield: As a matter of fact, your Honor, these three were not.

Mr. Smith: In the pre-trial order they were included, but not in the list of exhibits. At the first pre-trial.

The Court: So there will be no confusion in the

record, let us stipulate that the deposition of Archie Eugene Corbari, dated October 17, [134] 1952, the deposition of W. W. Lord, dated October 17, 1952, the deposition of Sam Wahyou and Forrest E. Macomber dated October 18, 1952, have all heretofore been admitted in evidence.

Mr. Macomber: So stipulated.

Mr. Smith: That is agreeable. Now, your Honor, the Wisecarver deposition, I believe, was conditionally admitted, subject to further ruling on the part of the Court, and will there be a further ruling at this time, or will the Court reserve the ruling until later?

The Court: Now counsel, what was that?

Mr. Smith: It was my impression that the Court ruled on the Wisecarver deposition that it was conditionally admitted, subject to further order of the Court, and I wondered if there would be an order at this time, or whether you would reserve the ruling until later; and there was further foundation to be laid. I do not believe it was admitted.

Mr. Greenfield: It was admitted, your Honor. It is marked.

The Court: I do not think we have any loose ends.

Mr. Smith: I think not. I think that is everything, so far as we are concerned. Plaintiffs rest.

The Court: Any rebuttal? [135]

SAM WAYHOU

having been previously sworn, testified on rebuttal as follows:

Examination

Q. (By Mr. Macomber): Did you have any cattle on the Diamond S Ranch in 1950?

A. 1950—we had no cattle in 1950.

Q. Did you have any cattle on the ranch in 1951? A. Yes. Not my own cattle, sir.

Q. Whose cattle?

A. Henry Platt from St. John.

Q. How many? A. Oh, around six hundred.

Q. And for what period of time?

A. From June to the end of October.

Q. Were they on the base ranch, that is, on the meadow land, or where?

A. When the cattle come in they were on the grazing range.

Q. Then what?

A. Then they go back.

Q. And when did they go off the land?

A. Oh, I believe that they went off the range the end of October or sometime in November. Cattle was sold.

Q. At the time the cattle were sold, was there any feed left in the meadows?

A. No, there wasn't much feed in the meadow on account of the meadow got water on it. The rest of the ranch not much feed. [136] Couldn't water enough get up that high.

Q. What was the condition of the ditches on the ranch in 1951?

(Testimony of Sam Wahyou.)

A. The condition in 1951 was the ditches was very bad.

Q. Did you have any alfalfa on the ranch in 1951? A. Oh, yes.

Q. How many acres?

A. 1951—I believe we had four or five hundred acres; just planted.

Q. The first year?

A. Yes, first or second; then we planted corn in '52.

Mr. Macomber: That's all. That is defendants' case, your Honor.

The Court: Mr. Wahyou, will you please remain in the witness stand. This morning you testified that when you purchased the Corbari stock he owed you some money. I do not recall whether or not you testified as to the amount of money that he owed you at that time.

A. Yes, he owed me some money.

Q. Now you said that you bought this stock, having in mind that he owed you some money, that you were also security on another indebtedness, that those matters being true, you failed to make a profit on the venture? [137] A. Yes.

Q. Somewhere I recall that you said he owed twelve thousand dollars to a bank and you were surety on that?

A. Not the bank; it was personal.

Q. And was the amount twelve thousand or \$12,500? A. Something like that.

Q. Did you have to make good on that?

(Testimony of Sam Wahyou.)

A. No, I didn't make good on that. The money he borrowed from this place, the security was his ranch.

Q. So even though you were a guarantor on that loan, you didn't pay anything?

A. I didn't pay it. His ranch, the Tracy Ranch, was sold, foreclosed later on.

Q. Now you bought the Corbari note in the amount of five thousand dollars approximately from the Valley Bank?

A. No, the Bank of America.

Q. And that bank held this stock in pledge that you subsequently bought? A. Yes.

Q. You paid the Bank of America approximately five thousand dollars for that note?

A. Yes, five thousand five hundred.

Q. Somewhere between five thousand and six thousand? [138] A. Yes.

Q. Now was there any other indebtedness owed by Mr. Corbari to you, other than these items we have discussed, that you have expended over here?

A. No, I think he owed me personally just a small amount, fifteen or sixteen hundred dollars.

The Court: Do you desire to ask any questions on the examination, gentlemen?

No questions.

The Court: Are there any other witnesses?

Mr. Macomber: That is all, your Honor.

The Court: I assume, then, that the case stands submitted. You know in the vicissitudes of ranching and livestock business, a spread of years is

about the only safe measuring device that an operator can go on. I make this observation, that the years we have had have all been after 1951, and as far as this Court is personally concerned, the years prior to 1951 would have been just as important and helpful to the Court. In other words, the pendulum is moving up and down and it is a difficult thing to judge a matter looking through the gun barrel from one end. That is just what we are [139] doing. We are working this case out on the basis of hind-sight, to a large extent. [140]

[Endorsed]: Filed Nov. 6, 1957.

PLAINTIFF'S EXHIBIT No. 1-P

[Title of District Court and Cause.]

DEPOSITION OF SAM WAHYOU

Stockton, California, October 20, 1956, 1:30 o'clock, p.m.

Appearances: For the Plaintiffs: Smith & Ewing, Attorneys-at-Law, Caldwell, Idaho, by Laurence N. Smith, Esq. For the Defendants Diamond-S Ranch Co., and Sam Wahyou: Forrest E. Macomber, Attorney-at-law, Bank of America Building, Stockton, California. [1]*

Deposition of Sam Wahyou, a witness of lawful age, taken on behalf of the plaintiff in the above entitled cause, wherein G. A. Miller, W. W. Lord, Ralph Smeed, L. H. Staus and Jack Smeed, trustees of John W. Smeed Estate are the plaintiffs and

* Page numbers appearing at top of page of Original Deposition.

(Deposition of Sam Wahyou.)

Archie E. Corbari, otherwise known as A. E. Corbari, Marie Corbari, Sam Wahyou, Diamond-S Ranch Co., incorporated under the laws of Nevada, Forrest E. Macomber, A. E. Corbari, Sam Wahyou, K. R. Nutting, and Thomas G. Lee, trustees for the assets of Diamond-S Ranch Co., Thomas G. Lee, Toy Quong, Joe Sin, K. R. Nutting, Yip K. Toon, Herbert Jang, otherwise known as Herbert Jong and D. W. Zignego, are defendants, pending in The United States District Court for the District of Nevada, pursuant to agreement, before Darrel D. Hill, a notary public in and for San Joaquin County at the law offices of Forrest E. Macomber, Bank of America Building, Stockton, California on the 20th day of October, 1956.

Mr. Smith: This is taken pursuant to oral stipulation as to time and place of taking of deposition under the usual stipulations pertaining to federal rules.

Mr. Macomber: Yes. [2]

SAM WAHYOU

a witness, named in the agreement, being of lawful age, and being first duly sworn in the above cause, testified on his oath as follows:

Examination

Q. (By Mr. Smith): Will you state your name?

A. Yes. Sam Wahyou.

Q. And you reside at Stockton, California?

A. Yes.

Q. And you are one of the defendants in the case

(Deposition of Sam Wahyou.)

of G. A. Miller, W. W. Lord, Ralph Smeed, L. H. Staus and Jack Smeed, trustees of John W. Smeed Estate. A. Yes. Excuse me just a minute.

Q. You are one of the defendants in this pending lawsuit?

A. Well, I guess so. They are suing me or?—

Q. Now, Mr. Wahyou, several years ago you bought some stock, 310 shares of stock of the Diamond-S Ranch Corporation from the Bank of America at a foreclosure proceeding, is that correct? A. Yes.

Q. And that was the stock that formally had been owned by Archie Corbari? A. Right.

Q. And you from time to time had purchased other shares of stock of this corporation?

A. You mean I did? [3]

Q. Well, you owned stock in the corporation prior to the purchasing of the 310 shares of the Corbari stock? A. Yes.

Q. And you still own stock now, do you not?

A. Yes.

Q. Now, are you fully acquainted with the financial transactions of the Diamond-S Ranch Company? A. Yes.

Q. Do you know and are you aware of the declining financial position of the corporation over the period of the last five years?

A. Well, what do you mean by such words?

Q. I mean this: you are aware of the fact that the corporation has lost money over the past five years? A. Yes.

(Deposition of Sam Wahyou.)

Q. And that between the year 1950 and 1951 it lost money? A. Yes.

Q. And between the year '51 and '52 it lost money? A. Uh-huh (yes).

Q. Between '52 and '53 it lost money?

A. Lost money every year.

Q. Are you acquainted with Frank H. Hogue?

A. Yes.

Q. How long have you known Mr. Hogue?

A. Oh, about four or five years—four years I believe.

Q. You have been associated with him in business ventures? [4] A. Yes.

Q. You are now associated with him in some business venture, are you not? A. Yes.

Q. On August 30th, 1953, you sold to Frank Hogue a substantial block of stock in the Diamond-S Ranch Company, did you not? A. Yes.

Q. And at the time Mr. Hogue purchased this stock he was aware of the condition of the corporation? A. What do you mean by that?

Q. He knew of the financial condition of the corporation, did he not? A. Oh, yes, he knew.

Q. And you discussed the transaction with him at some length, did you not? You talked with him about buying the stock?

A. Yes, yes. I am not talking of buying; I sell it to him.

Q. Yes. How did the arrangement come about that he purchased the stock?

(Deposition of Sam Wahyou.)

A. Well, the arrangement was this: the Ranch Company, the Diamond-S Ranch Company, financially couldn't go ahead with the operation so we asked Frank to come in with the corporation to finance the—to keep the ranch going.

Q. Now you sold him a number of shares [5] of stock. Do you know how many?

A. Well, I don't know exactly but he own one-third. We sold him-between us, I give him some stock and Nutting give him some stock to make his one-third interest.

Q. In other words, you and Mr. Nutting together with Mr. Hogue worked out a plan so that Mr. Hogue purchased stock from you and from Mr. Nutting so that he would own one-third of all of the outstanding stock of the corporation?

A. Well, he don't buy from Nutting. Nutting just give him what it was he had more than one-third. In other words, just give him.

Q. You sold him 106½ shares of stock, according to the stock record, is that correct, as far as you know?

A. Well I can't remember but he own one-third interest.

Q. All right.

A. He had a one-third interest. I sold him mine and then Nutting give him what he got more than one-third and he give him that so make him own one-third.

Q. Now Mr. Hogue reports that he paid you

(Deposition of Sam Wahyou.)

A. Well, it still lose money.

Q. Well, let's get at it this way: You bought Corbari stock in May of 1951? A. Yes.

Q. You sold to Hogue in August of '53.

Between May of '51 and August of '53, the ranch had lost money, had it not?

A. Yes, that's right.

Q. Now in your deposition that you gave here four years ago you testified that at the time you bought the stock that Corbari had owned you bought it to protect yourself because it was worth more money than you paid for it?

A. Well, I can't remember what I told you those days, but whatever it is naturally it's got to be worth more before I buy it, and, not only that, because I don't want to let the stock go outside and someone else have it. You know, that is the reason, too.

Q. Well, calling your attention to page 112 of the record of the United States Court of Appeals, Case Number 14,902, titled the same as this case, you were asked this question—and it was referring to the Corbari stock: "But why did you buy it from the bank?" Your answer: "Because I would have the stock here and the stock is worth more money, oh, maybe ten thousand worth more. He owes me money, too. If the bank take that here I am going to lose. [9] I can't get no money from him, that is why I bought it from him." A. Yes.

Q. Now at that time you thought that stock was

(Deposition of Sam Wahyou.)

worth ten thousand dollars more than you paid for it?

A. Probably, yes.

Q. And you paid five thousand for it?

A. Yes—I can't remember five thousand. More or less, yes.

Q. Five thousand or fifty-five hundred, one or the other?

A. Yes.

Q. I don't remember.

A. Yes.

Q. But it was one or the other?

A. Uh-huh (yes).

Q. Now you are fully familiar with the ranch, are you not, the real property——

A. Yes.

Q. ——of the ranch?

A. Yes.

Q. And in 1951, at the time you bought this stock, have you any idea of the value of the real estate? How much was that ranch worth?

A. Well, I really don't know but I try to get all I can to get out. I try to sell the ranch all the time for what I got into it, see. [10]

Q. Have you had this ranch offered for sale?

A. Well for sale all the time but I never had anybody give me an offer.

Q. What price have you had on it, what has been the asking price for the ranch properties of the Diamond-S Corporation?

A. When was that? What year?

Q. Well, do you recall in 1950 what you were asking for it?

A. I don't.

Q. Do you in 1951?

(Deposition of Sam Wahyou.)

A. I can't recall how much I asked for it but I tried to sell it for what we got in there.

Q. Was there every a time that you offered this for sale at a price of approximately \$325,000, that is the real estate?

A. No, I don't think so.

Q. Do you recall making a commitment——

A. 1951, you say? A. '50 or '51.

A. No, I don't think so.

Q. Do you recall making a commitment to a real estate agent at Winnemucca, Nevada for the sale of this property? A. No.

Q. Do you recall the corporation authorizing such proposed sale? [11]

A. Well you mean our company authorizing the selling?

Q. Yes, your company.

A. Well, we say in the meeting, we want to sell all the time and try to get what we got in it.

Mr. Macomber: Just a minute. Let's see if I understand it correctly.

You mean for years this company has been trying to sell the ranch? A. Yes.

Mr. Macomber: For whatever you had in the ranch? A. Uh-huh (yes).

Q. (By Mr. Macomber): Without anything for the stock?

A. That's right, just what we got in it.

Q. (By Mr. Macomber): No amount for the stock?

(Deposition of Sam Wahyou.)

A. Yes. We keep trying to sell it here to get out.

Q. (By Mr. Smith): What price have you had on the ranch for sale? A. Now?

Q. Now what price, what are you asking for it now? A. Now, a million dollars.

Q. A million dollars? A. A million dollars.

Q. That is for the real estate up there?

A. Yes, real estate and cattle, equipment, everything. [12]

Q. All right.

Have you divided that? A. How's that?

Q. Have you divided that, broken that down, so much for land, so much for machinery, so much for cattle? A. No.

Q. It is just a flat million dollars?

A. A million dollars.

Q. Take it or leave it.

A. One-package deal, that's right. That is what we got in it.

Q. You think that a fair market value of the Diamond-S ranch properties then is a million dollars?

A. Well I don't know. That is what we got in there.

Q. That is what you are asking for it?

A. Yes.

Q. A million dollars? A. That's right.

Mr. Macomber: Might take less?

A. I try to give away but Nutting won't.

Q. (By Mr. Smith): Well, Mr. Nutting will be here shortly and we'll take his deposition.

(Deposition of Sam Wahyou.)

At least in 1951 when you purchased the shares of stock of Corbari you thought that they were worth considerably more than you paid for them?

A. Probably is, sure. [13]

Q. And how did you arrive at that?

A. Well, at the time I feel the land was worth more money than that.

Q. What did you think the land was worth?

A. At that time?

Q. At that time.

A. Well maybe worth about maybe a lot more than what we paid for it, one hundred and fifty, two hundred thousand.

Q. You think it was worth one hundred and fifty or two hundred thousand or more?

A. Maybe, I don't know. But on that time, oh, I don't think I am going to get too heavy. We had a bad enough stock, so far as our statement showed wasn't worth very much money.

Q. Well the statement shows that the value of the real estate is approximately \$94,000.

A. Yes, that is from the beginning.

Q. From the beginning? A. Yes.

Q. The land is worth considerably more than that statement reflects?

A. That's right; that's right.

Q. And have you any idea how much more?

A. Well a hundred thousand—a hundred thousand dollars easy.

Q. Easy a hundred thousand dollars? [14]

A. Yes.

(Deposition of Sam Wahyou.)

Q. Mr. Wahyou, don't you think as a matter of fact that it is worth two hundred thousand more than that statement shows?

A. What, the land?

Q. Yes?

A. Well, the statement show—no, not the land, not just only the land.

Q. I am talking about the land.

A. I don't think so.

Q. You think a hundred thousand more?

A. Yes.

Mr. Macomber: Just a minute now. That isn't what the witness testified to.

Mr. Smith: Yes, it is, as I understand.

Mr. Macomber: He didn't say it was worth a hundred thousand more than the statement showed. He said it was worth a hundred thousand.

Mr. Smith: Just a minute.

Mr. Macomber: Read the answer.

Mr. Smith: Read it back.

The Witness: You mean a hundred thousand plus ninety-four thousand, you mean?

Q. (By Mr. Smith): Yes.

A. Well, that I don't know. I said worth over a hundred thousand dollars, I say, I mean more than what we paid for it. [15]

Q. Yes.

A. That's right. But not—that I don't know, as to what we paid ninety some thing thousand, cost that time. Land go up more so it is worth more than

(Deposition of Sam Wahyou.)

a hundred thousand but not on top of the ninety-four. That I don't know. It is worth more than a hundred thousand dollars, the ranch, I mean, that is what I am thinking about, too.

Q. Well, now what you said, Mr. Wahyou, was that you thought the ranch was worth easily more than a hundred thousand more than you paid for it.

Mr. Macomber: No, he didn't say that.

Mr. Smith: Just a minute.

Mr. Macomber: You're not going to say he did say that when the record speaks for itself.

Mr. Smith: Well now, don't get yourself all boiled up here.

Mr. Macomber: I don't like your misstatements as to what he said. The record speaks for itself.

Mr. Smith: Now we'll let the record speak for itself.

A. I said over a hundred thousand, worth over a hundred thousand.

Mr. Smith: Wait a minute, Mr. Wahyou. The record shows here that I asked if the property was worth—how much more the property was worth than the book value and you said easily a hundred thousand. Now did you mean [16] it was worth a hundred thousand more than you had it on the books for? A. No, no.

Q. What did you mean?

A. I mean our land we paid for it ninety-four thousand, when that time it was over ninety-four thousand. It would be one hundred thousand or better.

(Deposition of Sam Wahyou.)

Q. You mean only six thousand more than you paid for it?

A. Well, because land raises up, it looks better, prospect better.

Q. What year did you buy that property, Mr. Wahyou? A. '44, '45, '45 I think.

Q. And in 1951 then you think it was worth something over a hundred thousand?

A. That's right.

Q. Do you know how much more?

A. I don't know, I don't know how much more but we try to sell it all the time. Many a time.

Q. Mr. Wahyou, the books of the corporation for the year ending December 31, 1955 show assets of cash, livestock, depreciable assets, land, advances and other assets totaling \$455,021.29.

Now, are those statements shown in the balance sheet of the Diamond-S Ranch Company correct as to the position of that corporation, do you know?

A. Absolutely our statement is correct. Yes, [17] our statement, yes. I don't know what you read, a number here, I can't—you know I have got nothing to look at it.

Q. Well, I'll get at it this way, Mr. Wahyou—

A. Yes.

Q. (Continuing)—the statement that appears on the books of the Diamond-S Ranch Corporation, that statement is correct as to the condition of the corporation? A. Yes, sir.

Q. Mr. Wahyou, the assets of the corporation as of the day that you purchased the Corbari stock, or

(Deposition of Sam Wahyou.)

the statement of the corporation as of the date that you purchased the Corbari stock showed the corporation to be broke, that is, it had expended \$6,000 more than all of the contributed capital.

Mr. Macomber: Are you making that as a true statement?

Mr. Smith: Yes.

Mr. Macomber: Well, I don't think, so far as I know, that there has been any statement as of the date that he bought the stock.

Mr. Smith: All right. Just strike that. Just strike that question one minute.

Q. (By Mr. Smith): Mr. Wahyou, the balance sheet of the Diamond-S Ranch Corporation shows as of 12-31-51 that there was a net loss to date, including the capital stock or original investment of \$7,122.40. Now, if that [18] statement is true, how do you arrive at the fact that you thought Corbari stock, which represented approximately 20 per cent of all of the outstanding stock, was worth some ten thousand dollars more than you paid for it?

A. In September, 1951?

Q. Yes?

A. Well, I couldn't tell you exactly because you asked me something there and I—you know as to the statement and all the statement coming now, you know, I can't remember those things. I have got to have a paper to look at. Just a statement, itself, what it says, from our own office, our statement, what it says.

(Deposition of Sam Wahyou.)

Q. Mr. Wahyou, you were familiar with the condition of the business at the time you bought that stock, weren't you? A. Yes.

Q. And you knew exactly the condition of the corporation? A. Yes.

Q. So that when you say that you think the stock was worth at least ten thousand dollars more than you paid for it, you must have felt, did you not, that the land was worth much more than you had it on the books for?

A. Well, that I don't know. But so far as our company it was what they paid for it, it is what they show there. So when I bought the stock and I got a chance to buy it off the company and make money or lose money, that is my [19] business. And I got a chance to buy it.

Q. You thought you were going to make money, did you not? A. Oh, sure.

Q. You intended to make money when you bought it? A. Sure.

Q. And you thought that you would make at least ten thousand dollars or more?

A. Well maybe more. Maybe. I don't know.

Q. How much did you think you would make?

A. Well, that time when I bought it here the principal idea was first I thought I was going to put my ranch clear through to make money, and secondmore, I don't want a stock to go out someone else bought it, so that is why I bought the stock. I didn't buy from Corbari, I buy from the bank.

Q. Yes, I know.

(Deposition of Sam Wahyou.)

A. I can't see anything wrong there. It's on the record.

Q. Did you or did Mr. Nutting make the arrangement with Mr. Hogue for the purchase of this stock?

A. Yes—whose stock?

Q. At the time that Mr. Hogue purchased the stock did you or did Mr. Nutting make the arrangements with Mr. Hogue?

A. Sure, yes.

Q. Well, who did?

A. Mr. Nutting.

Q. Well, that is what I asked. [20]

A. Yes.

Q. You had nothing to do with it yourself?

A. Oh, yes, we three were there, we sit down and talk together.

Q. Where did the conversation take place?

A. At Winnemucca.

Q. When?

A. Well—

Q. Well, the sale indicates, the stock record indicates that the sale was made August 30th, 1953.

Is that correct?

A. 1953. Yes. Whatever the record shows. But just a few days before that.

Q. Well the transfer was made that day, so it was just a few days prior to that?

A. Yes.

Q. At Winnemucca?

A. At Winnemucca.

Q. And Mr. Hogue had been out and looked over the ranch?

A. Sure.

Q. And looked at all of it?

A. Yes.

Q. He knew of the condition?

A. Well, he was down there one day looking at the ranch.

(Deposition of Sam Wahyou.)

Q. And he knew of the condition of the ranch?

A. Yes. [21]

Q. That is, of the corporation, he saw the books of the corporation or at least he saw a report?

A. No, I don't think he saw a book.

Q. Did anybody tell him of the condition of the ranch? A. Yes, we told him the condition.

Q. He knew of the financial condition of the Diamond S Ranch Corporation as of that date?

A. Well, he didn't know but we told him.

Q. That is what I mean. A. Yes.

Q. He was informed by you and Mr. Nutting?

A. That's right.

Q. And then he purchased that stock for thirty-five thousand dollars? A. That's right.

Mr. Smith: I think that is all.

Examination

Q. (By Mr. Macomber): Mr. Wahyou, state whether or not one of the reasons that you wanted Hogue in this picture was because he had a lot of money and could loan the corporation money to operate on if he bought in.

A. That is the reason we asked him to come in in business with us, yes.

Q. Now Mr. Hogue paid thirty-five thousand dollars for his stock, did he not?

A. Yes. [22]

Q. For a third of all the stock of the company?

A. Yes.

Q. And what was to be done with the thirty-

(Deposition of Sam Wahyou.)

five thousand dollars? Was there anything said about that?

Mr. Smith: Just a minute. I object to that as incompetent on the ground that what was to be done is immaterial.

Mr. Macomber: Well, it is part of the deal.

Q. (By Mr. Macomber): Answer the question.

A. The only thing I have to tell you, the thing is because, see, the ranch company we got no money, we can't continue operating so we want Mr. Hogue come in the picture to help us continue, so I told him — I got everybody's stock together, I take it over, I sold it to him, Hogue, for \$35,000. I took the money and we put it up at the Diamond S Ranch here to operate.

Q. (By Mr. Macomber): In other words, before Hogue agreed to buy the stock he insisted that you put the thirty-five thousand or loan the thirty-five thousand dollars to the Ranch Company?

A. That's right.

Q. Until such time as you made some money?

A. That's right.

Q. All right. The stock actually, most of it, came from Tommy Lee, Herbert Jang, Yip Toon, Toy Quong, and Joe Sin, did it not? [23] A. Yes.

Q. What did they get for their stock at that time? A. They didn't get nothing.

Q. Did you tell them that they would get anything for the stock?

A. Well here's the way I tell them:

(Deposition of Sam Wahyou.)

The ranch got to keep continue going, see.

Q. Yes.

A. "You can't put up the money to keep the ranch going so we got to have—we got to get somebody else who put the money in there."

So I say—I told them, let them just give the stock to me and I sell it to these people and put the money in the ranch, when I come out of the ranch here what money I get out of the ranch I pay you fellows one hundred per cent back and I take the loss.

Q. Now has the ranch lost money almost continually from the time that the corporation has owned it? Did it ever make any money?

A. Never made any money, no, just continually down, right up to date.

Q. Now have you been willing—that is when I say you I mean as a corporation been willing to sell the ranch for the past five or six years?

A. Yes.

Q. At what price? [24]

A. We never have really set the price and we tried to get out what we got in it and what loan we give to the ranch company, plus I sign a note for the ranch, see.

Mr. Smith: Plus what?

(Whereupon the reporter read the answer.)

Q. (By Mr. Macomber): In other words, if you could get out enough money to pay off all the debts of the company——

A. Yes.

(Deposition of Sam Wahyou.)

Q. —plus whatever advances you made to the company—— A. Yes.

Q. —without any allowance for capital stock—— A. I take that.

Q. You take that? A. Yes.

Q. And you would do that right now, wouldn't you?

A. I give it to you right now, and I take 20 per cent of what I loan to the company off.

Q. In other words, you would agree to lose all of your capital investment?

A. All capital investment.

Q. And 20 per cent of what you loaned to the company? A. To the company.

Q. And take that and get out?

A. Yes. And Mr. Frank Hogue is willing to do that, too. He told me that. I just speak for him. I know he told me that. [25]

Mr. Macomber: That is all.

Q. (By Mr. Smith): Mr. Wahyou, the thirty-five thousand that went back in that you got from Frank Hogue for the capital stock is evidenced by a corporation note from the corporation to you, isn't it? A. Yes.

Q. So that you actually received \$35,000 for that stock? A. Yes.

Mr. Smith: That is all.

Mr. Macomber: That is all.

/s/ SAM WAHYOU,

Signature of Witness.

Subscribed and sworn to before me this 13th day of November, 1956.

[Seal] /s/ DARREL D. HILL,
Notary Public in and for the County of San Joaquin, State of California. [26]

Admitted in Evidence June 4, 1957.

PLAINTIFF'S EXHIBIT No. 5-P

[Title of District Court and Cause.]

DEPOSITION OF ROBERT WISECARVER

Appearances: Laurence N. Smith, Esq., Caldwell, Idaho, for Plaintiffs. Forrest E. Macomber, Esq., 711 Bank of America Bldg., Stockton, California, for Defendants. [1]*

Be It Remembered, that pursuant to notice and subpoena duces tecum, and on Monday, May 6, 1957, commencing at the hour of 10:00 a.m. thereof, at the offices of Nichols, Williams, Morgan & Digardi, 616 First Western Bank Bldg., Oakland 12, California, before me, Frank Lipold, a Notary Public in and for the County of Alameda, State of California, personally appeared Robert Wisecarver, a witness of lawful age, produced on behalf of the plaintiffs herein, under and pursuant to Rule 26, and following, of the Federal Rules of Civil Procedure, who, being by me first duly sworn, was then and there examined and interrogated as a witness in the above-entitled court and cause.

* Page numbers appearing at top of page of Original Deposition.

(Deposition of Robert Wisecarver.)

It was stipulated that Frank Lipold may act as Notary Public and shorthand reporter in the taking of said deposition.

It was further stipulated that said deposition is taken pursuant to Rule 26, and following, of the Federal Rules of Civil Procedure.

It was further stipulated that all objections except as to the form of the question and all motions are reserved until the time of trial.

It was further stipulated that in the event the witness refuses to answer a question it be deemed that the Notary Public has instructed the witness to answer and that the witness refuses on advice of counsel.

It was further stipulated that the witness need not [2] sign said deposition before the Notary Public.

It was further stipulated that said deposition may be delivered to the attorney representing the witness, to be presented to the witness to be read, corrected, and signed, and that if it is not signed by the time of trial, reasonable opportunity having been given to do so, a copy may be used at the trial with the same effect as though it had been signed.

ROBERT WISECARVER

a witness, being of lawful age, and being first duly sworn in the above cause, testified on his oath as follows:

Mr. Smith: I suppose the usual stipulations, Mr. Macomber, pertaining to the objections to relevancy and competency——

(Deposition of Robert Wisecarver.)

Mr. Macomber: In accordance with the Code, in other words, of Civil Procedure.

Examination

Q. (By Mr. Smith): Mr. Wisecarver, will you state your name? A. Robert Wisecarver.

Q. And where do you reside?

A. Brentwood, California.

Q. And what is your occupation?

A. Banker.

Q. And with what Bank?

A. Central Valley National Bank. [3]

Q. At Oakland, California? A. Right.

Q. What work do you do in connection with the Bank? A. In the Credit Department.

Q. And have you done some appraisal work from time to time for the Bank? A. Yes, sir.

Q. Are you their official appraiser on various types of loans? A. I do some appraising.

Q. Well, is that principally what you do for the Bank? A. No.

Q. You just do some appraising as the matter comes before you? A. That is right, sir.

Q. Now, did you, in 1954 or 1955, make an appraisal of the ranch property of the Diamond S. Ranch Corporation, which properties are located in Humboldt County, Nevada?

Mr. Macomber: I will object to that as being hearsay, calling for hearsay, and being incompetent, irrelevant and immaterial but you go ahead and answer it.

The Witness: Yes, sir.

(Deposition of Robert Wisecarver.)

Mr. Smith: And did you physically inspect the properties yourself? A. Yes, sir.

Mr. Macomber: May it be understood that the objection goes to the whole line of his testimony so I won't have to repeat it each time?

Mr. Smith: Oh, surely, that will be fine.

Mr. Macomber: Fine.

Mr. Smith: Will you give me the date of that appraisal? [4] A. June 15, 1954.

Q. And at whose request was the inspection made? A. Mr. Wahyou, W-a-h-y-o-u.

Q. Then that is Mr. Sam Wahyou, one of the defendants in this action?

A. I presume so, I don't know anything about it.

Q. Well, it is the Mr. Sam Wahyou of Stockton, California? A. Yes, sir.

Q. And did you accompany him to the ranch?

A. Yes, sir.

Q. And did you make a complete examination of the properties? A. To the best of my knowledge.

Q. Did you make any written memorandums though or written notes of the properties that you inspected? A. Just the appraisal.

Q. Do you have that with you?

A. Yes, sir.

Q. May I have it?

(Document handed to counsel by the witness.)

Q. (Continued) Handing you the appraisal, I

(Deposition of Robert Wisecarver.)

will ask you if that is the appraisal that you made of the Diamond S. Ranch properties in Humboldt County, Nevada? A. Yes, sir.

Mr. Smith: And I would like to have it marked Exhibit "A", please.

(Document marked Plaintiff's Exhibit "A"

for identification, pages 1 through 6 inclusive.)

Mr. Smith: Now, Mr. Wisecarver, if you will take that appraisal, and I will ask you if you have broken that down into values, first for the real estate, and then for livestock? A. Yes. [5]

Q. What was the value you placed upon the real estate of the Diamond S. Ranch Company, which real estate is located in Humboldt County, Nevada?

A. The land value is \$473,000, and the improvements some is \$14,300.

Q. Now, Mr. Wisecarver, was that appraisal made in connection with a loan which Mr., or which the Diamond S. Ranch Corporation procured from the Bank by which you are employed?

A. Yes, sir.

Q. And was that appraisal the basis for the loan? A. One of the bases for the loan.

Q. Did you know how much of a loan, how much of a loan was made to the corporation based upon that appraisal? A. Yes, sir.

Q. How much was that? A. \$225,000.

Q. And as an appraiser, did you feel that the land, that the assets, the land of the Diamond S. Ranch Corporation in Winnemucca, was worth at least twice the value of the loan?

(Deposition of Robert Wisecarver.)

A. No, I would say this was the full appraisal.

Q. Well, the appraisal is \$473,000, plus what else?

A. Plus \$14,300 given to the improvements.

Q. And do you think that is a full and fair appraisal of the property?

A. Yes, I would say it was a generous appraisal.

Q. Now, do you know whether or not there are any other assets of the Diamond S. Ranch Corporation?

A. No, I wouldn't know that.

Q. The only properties that you were shown are shown, are reflected in your appraisal?

A. Yes, sir. [6]

Q. Now, are you familiar with the Taylor grazing rights in connection with this ranch property?

A. Somewhat, yes. I make a memo of that in my appraisal, I believe.

Q. And what is your memo in that respect?

A. I don't see anything in here regarding it but I am somewhat familiar with it.

Q. Well, at the time you arrived at the value of the properties, you took into——

A. That is right.

Q. ——into consideration the grazing rights?

A. That is right.

Q. All of the Taylor rights?

A. (Witness nods head affirmatively.)

Q. You, I presume, determined at the office of the Taylor Grazing Service in Winnemucca the various units, animal units, in connection with the land?

(Deposition of Robert Wisecarver.)

A. That is right, we check them, yes.

Q. You had all of those things in consideration and in mind when you made the valuation that you did?

A. Yes, sir.

Q. Now, what has been your background for appraisal work?

A. Oh, appraised many farms, ranches, cow outfits, land with deciduous fruits, vines, pasture lands, row crop farming land, considerable grazing pasture lands, supported cattle and sheep.

Q. Then, this type of operation that the Company was operating at Winnemucca was not a new or different operation to you?

A. I would say not. [7]

Q. And are you familiar with what they were using the property for? You knew it was a cow and calf outfit, or a feeder outfit?

A. Yes, sir.

Q. And it was based upon the most valuable use of the property that you arrived at the value you did, is that correct?

A. Yes.

Q. And were they making the most valuable use of the property in your estimation?

A. That, I couldn't say. They were in the process of clearing land and planting it to crops, some crops that had, as far as these people were concerned I am told, have never planted before, some new grasses, expansion in alfalfa. They were making many changes at the time.

Q. Mr. Wisecarver, will you briefly outline the various observations that you made at the time you were on the property, that is as to irrigation, water

(Deposition of Robert Wisecarver.)

rights, equipment, availability of range, and all the various things that went into the arriving of the value that you set?

A. Well, they had a pipeline that they were putting in on government land for insurance water from Pole Creek; they were building a feed lot, they were putting up—they were making way for a feed lot; they were talking about feeding the cattle there. They were planting the level land to grasses that were better grown in arid areas, such as where the ranch is located. They had a, at that time I believe they had a barley crop in one end of the ranch. They had, I believe I have noted here, I put approximately 750 acres in alfalfa. [8]

Q. You made a personal inspection of all that?

A. Yes, sir.

Q. Now, this was done at the request of Mr. Wahyou? A. Yes, sir.

Q. Now, did Mr. Wahyou make any statements to you as to what he thought the value of the ranch was? A. Not that I recall.

Q. He was with you when you were up there?

A. Yes.

Q. Or you were with him?

A. (Witness nods head affirmatively.)

Q. And he had applied for a \$420—or \$225,000 loan, had he not? A. Yes.

Q. And it was to be based upon this particular piece of property? A. Yes.

Q. Now, what is the basis that the Bank makes

(Deposition of Robert Wisecarver.)

a loan on real estate, in relation to the appraised value and the size of the loan?

A. Usually fifty percent of the appraised value, by law sixty six and two thirds. The man is given a lot of consideration before you ever make the appraisal. We have had other dealings with Mr. Wahyou. They have been very satisfactory and that was an incentive to go up and make the appraisal for them.

Q. But the fact still remains that the appraisal you made reflects your best judgment as to the value of the property at the time you made the appraisal? A. Yes, sir.

Q. Now Mr. Wahyou felt, did he not, that it was well worth the appraisal that you made?

A. Oh, no doubt he did. He [9] asked for the appraisal to be made and he requested an appraisal to be made.

Q. Did he submit, at the time he asked the appraisal to be made, any figures as to what he thought the value of the property was?

A. No, sir, he didn't.

Q. Did he ever state to you what he thought the value of the property was?

A. Not that I recall.

Q. Did you have any discussion with anybody connected with the Diamond S. Ranch Corporation as to what they thought the value of the property was? A. No, sir.

Q. Do you think that, do you believe that current retail prices for real estate today is approxi-

(Deposition of Robert Wisecarver.)

mately the same that it was at the time you made the appraisal?

A. I wouldn't hazard an answer there. I really——

Q. You don't—You are not——

A. I am not familiar——

Q. You are unable to answer that?

A. That is right.

Q. Based upon the appraisal that you made, the loan to the corporation was consummated?

A. Yes, sir.

Q. And that resulted in mortgaging or a Deed of Trust on the property being given to your Bank?

A. A Deed of Trust, yes, sir.

Q. And that was in the amount of \$225,000?

A. That is right.

Q. And that is the Deed of Trust which is of record in Humboldt [10] County, Nevada?

A. That is right.

Mr. Smith: I think that is all, Mr. Wisecarver.

Mr. Macomber: On what date was that appraisal made? A. June 15, 1954.

Mr. Macomber: That is all.

/s/ ROBERT F. WISECARVER. [11]

[Endorsed]: Filed June 4, 1957.

[Endorsed]: No. 15796. United States Court of Appeals for the Ninth Circuit. G. A. Miller, W. W. Lord, Ralph Smeed, L. H. Staus and Jack Smeed, Trustees of John W. Smeed Estate, Appellant, vs. Archie E. Corbari, etc., et al., Appellee. Transcript of Record. Appeal from the United States District Court for the District of Nevada.

Filed: November 8, 1957.

Docketed: November 25, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15796

G. A. MILLER, W. W. LORD, RALPH SMEED,
L. H. STAUS and JACK SMEED, Trustees
of JOHN W. SMEED ESTATE,
Appellants,

vs.

1. ARCHIE E. CORBARI, otherwise known as
A. E. CORBARI
2. MARIE CORBARI
3. SAM WAHYOU
4. DIAMOND S RANCH CO., incorporated un-
der the laws of Nevada
5. FORREST E. MACOMBER
6. A. E. CORBARI, SAM WAHYOU, K. R.
NUTTING, and THOMAS G. LEE, Trustees
for the assets of Diamond S Ranch Co.
7. THOMAS G. LEE
8. TOY QUONG
9. JOE SIN
10. K. R. NUTTING
11. YIP K. TOON
12. HERBERT JANG, otherwise known as HER-
BERT JONG
13. D. W. ZIGNEGO, Appellees.

STATEMENT OF POINTS UPON WHICH
APPELLANTS INTEND TO RELY UPON
APPEAL AND DESIGNATION OF CON-
TENTS OF RECORD ON APPEAL

Statement of Points: Pursuant to Rule 17 (6) of the rules of the above entitled Court, appellants do hereby adopt the statement of points upon which they intend to rely on appeal as the same was filed

with the Clerk of the Trial Court on October 17, 1957, and appearing in the typed Record on Appeal now in the possession of the Clerk of the above entitled Court.

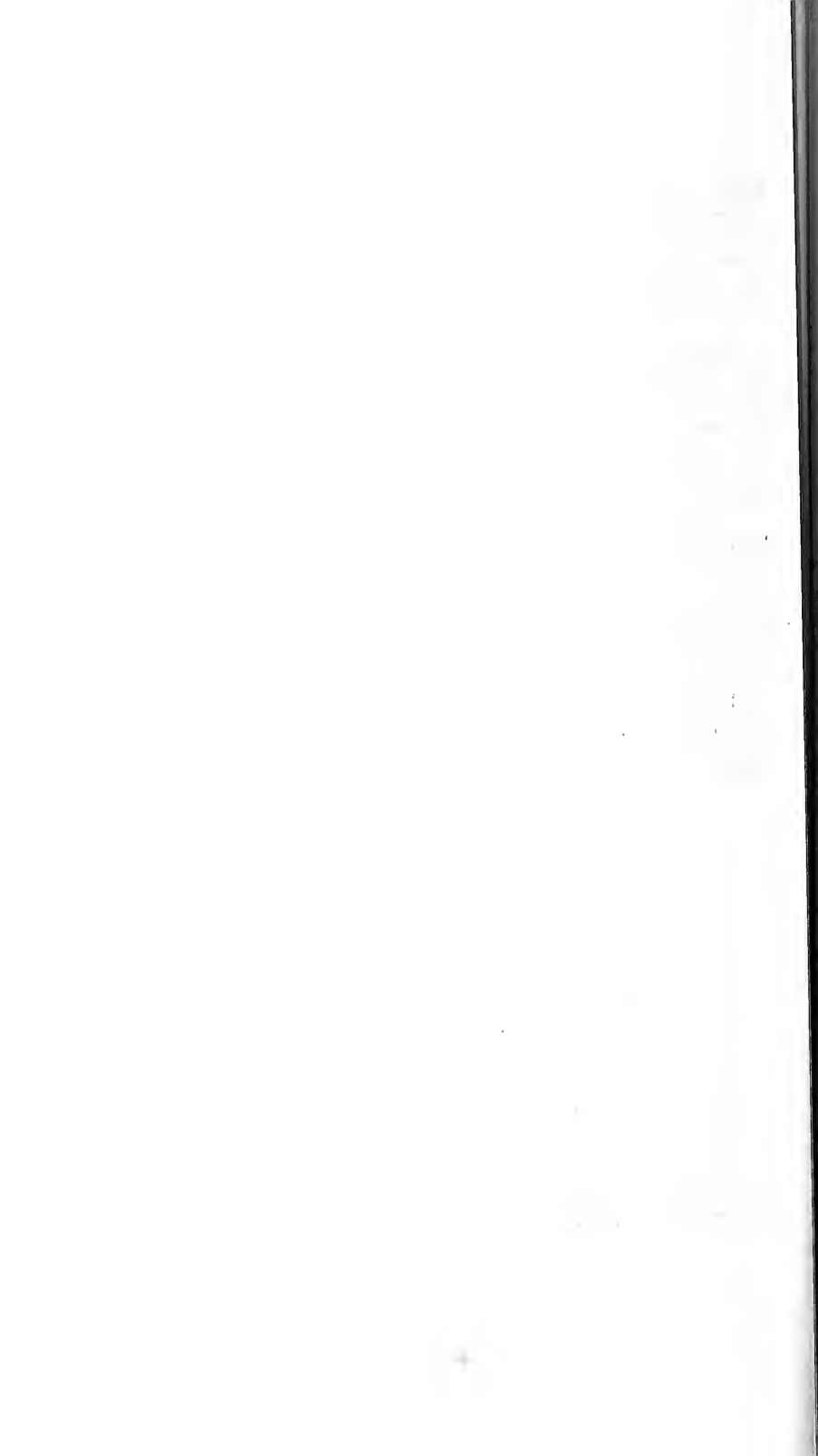
Designation of Contents of Record on Appeal: Pursuant to Rule 17 (6) of the above entitled Court, appellants do hereby adopt the designation of contents of Record on Appeal filed with the Clerk of the Trial Court on October 17, 1957, and appearing in the typed Record on Appeal now in the possession of the Clerk of the above entitled Court. It is to be noted that Items 1-27 appearing in said designation are not to be printed as they appear in the transcript of record in Case No. 14902, United States Court of Appeals for the Ninth Circuit.

PIKE & McLAUGHLIN,
SMITH & EWING,
CARTER, McCLENAHAN &
GREENFIELD,

/s/ By MILLER N. PIKE,
Attorneys for Appellants.

Acknowledgment of Service Attached.

[Endorsed]: Filed Nov. 25, 1957. Paul P. O'Brien, Clerk.



No. 15797 /

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARC D. LEH and L. WAIVE LEH,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DAVID E. BROWN and CHRISTOBEL H. BROWN,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONERS' OPENING BRIEF.

JAMES L. WOOD,

727 West Seventh Street,
Los Angeles 17, California,

Attorney for Petitioners.

FILED

FEB 21 1958

PAUL P. O'BRIEN, CLERK



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No. 15797
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

MARC D. LEH and L. WAIVE LEH,
Petitioners,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DAVID E. BROWN and CHRISTOBEL H. BROWN,
Petitioners,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONERS' OPENING BRIEF.

Statement Regarding Jurisdiction.

These are petitions to review decisions of the Tax Court. The United States Courts of Appeals have exclusive jurisdiction to review decisions of the Tax Court with an exception not applicable here. (Int. Rev. Code of 1954, Sec. 7482.) Venue lies in the Ninth Circuit, inasmuch as the office to which was made the return of the tax in respect of which the liability arises is located in the Ninth Circuit. [Int. Rev. Code of 1954, Sec. 7482; R. 5, 11, 18, 21.]

Statement of the Case.

The Commissioner of Internal Revenue issued notices of deficiency in federal income tax against petitioners for the taxable year 1950. Petitioners filed timely petitions with the Tax Court to redetermine and eliminate the deficiencies in both cases. Petitioners in the *Leh* case also prayed for a refund¹ of \$2,475.62. [R. 4, 7, 18, 20.]

All issues raised by the pleadings except the capital gain issue were settled by stipulation of the parties.

The capital gain question, the sole issue in this case, is whether the amount of \$183,330.50 received by the petitioners' partnership, The Progress Company, from Olympic Refining Company, a corporation, in 1950 is taxable as capital gain or ordinary income.

The Commissioner of Internal Revenue determined that such amount was taxable as ordinary income, and the Tax Court sustained the determination. (*Leh v. Commissioner*, 27 T. C. 892 (No. 110).) Accordingly, the Tax Court ordered and decided that there was a deficiency of \$20,308.88 for 1950 in the *Leh* case and a deficiency of \$21,403.52 in the *Brown* case. [R. 36, 37.]

Petitioners seek review of those decisions.

The cases were consolidated in the Tax Court [R. 3] and are being heard together on a single record on this appeal.

¹If the Tax Court finds that there is an overpayment rather than a deficiency, it has jurisdiction to order a refund. (Internal Revenue Code of 1954, Sec. 6512(b).)

Specification of Error.

It is the position of petitioners that the Tax Court erred in finding that the \$183,330.50 received in 1950 did not represent gain from the "sale or exchange" of property taxable as long-term capital gain under Section 117 of the Internal Revenue Code of 1939. The Tax Court could find no sale or exchange and hence no capital gain result. It saw in the contract of 1950 simply an extinction of contractual rights rather than a *transfer* of them. [R. 35.] The error is that the Tax Court failed to do two things: (1) To analyze correctly what the parties did as a matter of law; and (2) to recognize that there was simply a mislabeling here. A "cancellation" was actually a *transfer* of rights from The Progress Company to Olympic Refining Company—a transfer by reason of which Olympic received rights (property, though intangible) which it did not own before the transaction (rights to possess, use or resell a supply of gasoline). The only "extinction," "cancellation" or "termination" lay in the result that, common to every sale or exchange, the transferor parts with something and thereafter does not have it.

Summary of Argument.

In summary form, petitioners' argument is as follows:

In 1945 Olympic Refining Company entered into a supply contract with General Petroleum Corporation under which Olympic was entitled to buy and resell 3,500,000 gallons of General Petroleum gasoline per month at specified prices. [Jt. Ex. 1-A.] In 1948 Olympic, in turn, entered into a supply contract with The Progress Company, a partnership of which petitioners Marc D. Leh and David E. Brown were members. In the latter contract, the General Petroleum contract was incorporated by reference and provision was made that The Progress Company was to be entitled to buy and resell 2,250,000 of the 3,500,000 gallons of gasoline being supplied by General Petroleum per month. [Jt. Exs. 4-D and 5-E.] In a sense Progress was given the right of first refusal of the General Petroleum gasoline.

In 1950, The Progress Company received the \$183,-330.50 which is at issue in this case from Olympic for the "termination" of the 2,250,000 gallon supply contract. [Jt. Ex. 8-H.]

All the requirements of Section 117 of the Internal Revenue Code of 1939, 26 U. S. C. A., Sec. 117, have been met in that the contract rights of The Progress Company were "property," "held for more than 6 months," which was depreciable and used in the trade or business, and which was the subject of a "sale or exchange" in 1950. (Par. (3) of Argument in this brief below.)

The Tax Court erred in finding that there was no “sale or exchange.”

There is a “sale” where there is a transfer of property for cash. Property includes intangible rights. (Par. (4)(a) of Argument.)

The fact that the 1950 transaction was labelled a “termination” is not determinative that it was not a sale. (Par. (4)(b) of Argument.)

Petitioners’ position is supported by decision in the Second, Third, Fifth and Tenth Circuits. (Par. (4)(c) of Argument.)

The property which was transferred from The Progress Company to Olympic in 1950 was the exclusive right freely to possess, use, resell or otherwise deal with 2,250,000 of the 3,500,000 gallons of gasoline per month being supplied by General Petroleum. (Par. (4)(d) of Argument.)

The Tax Court misconceived the property rights involved in this case. (Par. (4)(e) of Argument.)

From the standpoint of economic realities, the property which was transferred in 1950 were rights of ownership and dominion over a monthly supply of up to 2,250,000 gallons of General Petroleum gasoline. (Par. (4)(f) of Argument.)

The decision below should, therefore, be reversed.

ARGUMENT.

(1) The Statute.

The statute involved in this case is Section 117 of the Internal Revenue Code of 1939, 26 U. S. C. A., Sec. 117, which relates to capital gains and losses.

The pertinent portions thereof are quoted in the Tax Court's opinion, set forth in the Record at pages 30 and 31 and are cited in the footnote herein.²

²Section 117. Capital Gains and Losses.

* * *

(j) Gains and Losses From Involuntary Conversion and from the Sale or Exchange of Certain Property Used in the Trade or Business.—

(1) Definition of Property Used In the Trade or Business.—For the purposes of this subsection, the term "property used in the trade or business" means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in Section 23(1), held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or (C) a copyright, a literary, musical, or artistic composition, or similar property, held by a taxpayer described in subsection (a)(1)(C). * * *

(2) General Rule.—If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. * * *

(2) The Facts.

The Tax Court made certain Findings of Fact. The findings are set forth in the Record at pages 24 to 30, and are incorporated herein by reference.

Petitioners make no exceptions to the correctness of those findings as far as they go. The Tax Court did err, however, in failing to make an additional finding of mixed fact and law that there was a "sale" in this case.

For purposes of convenience the Findings of Fact are referenced to the Record in the table in Appendix B.

(3) Requirements of the Statute and the Question.

Section 117(j) of the Internal Revenue Code of 1939 [R. 30, 31] provides that gain is to be taxed at long-term capital gain rates where the following elements are present:

- (a) There is a "sale or exchange";
- (b) Of "property";
- (c) Which has been "used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(1)";
- (d) And which has been "held for more than 6 months."

The "property" involved is the exclusive contract right to buy and freely to resell or otherwise deal with certain General Petroleum products acquired by The Progress Company under two letter agreements between the Progress Company and Olympic Refining Company dated January 28, 1948. [Jt. Exs. 4-D and 5-E.]

Such contract rights are "property" within the meaning of Section 117. "'Property' is a word of very broad meaning, and when used without qualification, expressly

made or plainly implied, it reasonably may be construed to include obligations, rights and other intangibles as well as physical things.” (*Fidelity & Deposit Co. v. Arenz*, 290 U. S. 66, 68 (1933), (bankruptcy case).) See also, *Lynch v. Alworth-Stephens Co.*, 267 U. S. 364, 369 (1925), (federal income tax case) and *Commissioner v. Ray*, 210 F. 2d 390 (5th Cir., 1954), *cert. denied* 348 U. S. 829 (1954), (federal income tax case involving Sec. 117).

The Tax Court found or inferred (and, petitioners submit, correctly) that the property was depreciable property used in the business and held for more than six months.³

The sole remaining question is whether the Tax Court erred in finding that there was no “sale or exchange” within the meaning of Section 117 of the Internal Revenue Code.

(4) There Was a “Sale or Exchange” in This Case.

(a) Definition of “Sale.”

In *Rogers v. Commissioner*, 103 F. 2d 790 (9th Cir., 1939), the Court of Appeals for the Ninth Circuit had occasion to consider the meaning of the phrase “sale or

³These property rights were “used in the trade or business” of The Progress Company in that The Progress Company bought petroleum products pursuant to its rights under the contract and resold the products in its business. [R. 52, 65-67.] And the contract rights were “subject to the allowance for depreciation provided in Section 23(1),” although no depreciation was allowable since the contract rights were created by an exchange of promises and had no cost for tax purposes. [R. 81.] (*Hickok Oil Corporation v. Commissioner*, 120 F. 2d 133 (6th Cir., 1941).)

The contract rights were held by The Progress Company continuously [R. 47] from January 28, 1948 [Jt. Exs. 4-D and 5-E] to July 26, 1950 [Jt. Ex. 8-H], and were therefore “held for more than 6 months.”

exchange” in the capital gain section of the federal income tax statute. In holding that there was a “sale,” and therefore a capital loss, where property was transferred in extinguishment of a mortgage debt, the Court adopted the following definition of the word “sale”:

“As defined by *Iowa v. McFarland*, 110 U. S. 471, 478, 4 S. Ct. 210, 214, 28 L. Ed. 198, ‘A sale, in the ordinary sense of the word, is a transfer of property for a fixed price in money or its equivalent.’ See, also, *United States v. Benedict*, 2 Cir., 280 F. 76, 80; *Gallus v. Elmer*, 193 Mass. 106, 78 N. E. 772, 8 Ann. Cas. 1067.”

The definition was approved and followed by the Court of Appeals for the Fourth Circuit in *Gruver v. Commissioner*, 142 F. 2d 363 (4th Cir., 1944) (capital gain case), and by other courts.

There is no doubt that intangible property may be the subject of a sale or transfer and that the phrase “sale or exchange” in Section 117 embraces intangible as well as tangible property. (*Commissioner v. Golonsky*, 200 F. 2d 72, 74 (3d Cir., 1952), *cert. denied*, 345 U. S. 939.)

(b) That the Transaction Was Denominated a Termination or Cancellation and Was With Olympic and Not a Third Party Are Not Determinative That There Was No Sale.

In this case The Progress Company acquired its rights from Olympic Refining Company in the letter agreements of January 28, 1948 [Jt. Exs. 4-D and 5-E] and disposed of those rights to Olympic on July 26, 1950, by a contract called a “Mutual Termination Agreement” [Jt. Ex. 8-H] which contained language of termination, cancellation and release.

The fact that the transaction in 1950 was with Olympic rather than with a third party is not determinative whether there was a "sale."

In *Commissioner v. McCue Bros. & Drummond, Inc.*, 210 F. 2d 752 (2nd Cir., 1954), *cert. denied*, 348 U. S. 829, where a lessee received consideration from the lessor for vacating the premises the Court said:

"If it [the lease] is sold by a tenant to a third person, the gain derived therefrom is a capital gain, *Sutliff v. Commissioner*, 46 B. T. A. 446, and we see no reason why a different result should be reached here." (210 F. 2d at p. 753.)

Similarly, in *Commissioner v. Goff*, 212 F. 2d 875 (3d Cir., 1954), where the exclusive right to the output of hosiery machines was relinquished to the other party to the contract, the Court said:

"We do not see in principle how the person to whom a tangible right is transferred can affect the question whether the transfer is a sale or exchange." (212 F. 2d at p. 876.)

The fact that the Mutual Termination Agreement [Jt. Ex. 8-H] was cast as a settlement agreement and used such language as "cancel," "terminate," and "release" rather than words such as "sell" or "assign" is not determinative. The reasoning in *Commissioner v. Golonsky*, 200 F. 2d 72 (3d Cir., 1952), a capital gain case where the lessee surrendered the premises to the lessor, is in point:

"Why then is a transfer of a leasehold interest by a tenant to a landlord not a 'sale?' To call the transaction a cancellation or termination of a lease and not a sale is, we think, to assume the point to be decided. Undoubtedly there is a cancellation of the

lease when the tenants voluntarily surrender the premises to a landlord in accordance with an agreement, but the fact that the cancellation occurs does not negative the fact that the transaction may constitute a sale.” (200 F. 2d at p. 73.)

In *McAllister v. Commissioner*, 157 F. 2d 235 (2d Cir., 1946), *cert. denied*, 330 U. S. 826, the Court, in reversing the decision of the Tax Court that the beneficiary of a trust made no transfer or assignment when the agreement provided for a “termination,” said:

“But what is this more than a distinction in words? . . . There surely cannot be that efficacy in lawyers’ jargon that termination or cancellation or surrender carries some peculiar significance vastly penalizing laymen whose counsel have chanced to use them. . . . What was practically accomplished remained the same.” (157 F. 2d at p. 236.)

Whether there was a “sale” is thus not dependent upon the intent of the parties, as such, or their language—it depends upon whether there was a transfer of property for a consideration. In this case there was obviously little attention, if any, given to language or tax consequences.

(c) The Case Law on the Question of Transfer of Property Rights v. Extinguishment.

The Tax Court found that the \$183,330.50 gain realized was not taxable as a capital gain because there was no “sale or exchange.” It said that the rights of The Progress Company “merely came to an end and vanished” [R. 34], citing *Commissioner v. Starr Brothers, Inc.*, 204 F. 2d 673, 674 (2d Cir., 1953).

While petitioners' agree that the transaction of 1950 did have the effect of extinguishing the right of The Progress Company to performance and also of terminating the contract, this "does not negative the fact that the transaction may constitute a sale." (*Commissioner v. Galonsky*, 200 F. 2d 72, 73 (3d Cir., 1952).) A sale is consummated, as we have seen, when property is transferred by its owner for a stipulated price which is paid. In *Commissioner v. Starr Brothers, Inc.*, 204 F. 2d 673 (2d Cir., 1953), and *General Artists Corporation v. Commissioner*, 205 F. 2d 360 (2d Cir., 1953), *cert. denied*, 346 U. S. 866, which were cited by the Tax Court [R. 34-35], "no 'sale or exchange' within the meaning of the statute was found because the contractual right was not transferred, but was released and merely vanished." (*Commissioner v. McCue Bros. & Drummond, Inc.*, 210 F. 2d 752, 753 (2d Cir., 1954), *cert. denied*, 348 U. S. 829.)

Where, however, a contractual right is transferred for a valuable consideration and continues to exist as property of the transferee-payor, courts have consistently held that there is a "sale or exchange" and that any gain realized is a capital gain. *Commissioner v. Goff*, 212 F. 2d 875 (3d Cir., 1954) (Taxpayers, who had received from A the exclusive right to buy from A the hosiery produced by machines operated by A, assigned the rights to A. *Held*, the transaction was a "sale" and the proceeds were capital gain); *Commissioner v. Golonsky*, 200 F. 2d 72 (3d Cir., 1952), *cert. denied*, 345 U. S. 939 (Surrender by lessee of promises to lessor before lease expired. *Held*, a "sale" and capital gain.); *Commissioner v. Ray*, 210 F. 2d 390 (5th Cir., 1954), *cert. denied*, 348 U. S. 829 (Lessee released lessor from lessor's

covenant not to rent to a certain type of store. *Held*, a "sale" and capital gain); *Commissioner v. McCue Bros. & Drummond, Inc.*, 210 F. 2d 752 (2d Cir., 1954), *cert. denied*, 348 U. S. 829 (Consideration received by lessee from lessor to vacate the premises. *Held*, a "sale" and capital gain, distinguishing *Commissioner v. Starr Bros.*, 204 F. 2d 673 (2d Cir., 1953), and *General Artists Corporation v. Commissioner*, 205 F. 2d 360 (2d Cir., 1953), because of the existence of "a more substantial property right which does not lose its existence when transferred." (210 F. 2d at p. 753); *Jones v. Corbyn*, 186 F. 2d 450 (10th Cir., 1950); *Walter H. Sutliff*, 46 B. T. A. 446 (1942).

The *Goff* case, *supra*, involved the right to buy the entire output of four hosiery manufacturing machines, a right quite like the one in this case. Similarly, the *Golonsky* case, *supra*, involved the right of possession of property, as did the *Ray* and *McCue* cases, *supra*. There is little difference between the right of possession of real property, and the right of possession of General Petroleum gasoline.

(d) Summary of Facts in This Case That There Was a Transfer.

A summary of the facts in this case will bring out the similarity between it and the *Goff* and other cases cited.

By letter agreement dated January 28, 1948 [Jt. Exs. 4-D and 5-E] Olympic transferred to The Progress Company the right to purchase and resell 2,250,000 gallons of gasoline per month of the 3,500,000 gallons per month which General Petroleum was committed to supply. [Jt. Ex. 1-A.] Thus The Progress Company acquired a valuable right and interest in the General Petroleum

supply of gasoline. It retained this interest from January 28, 1948, to July 26, 1950. On the latter date Olympic paid The Progress Company \$183,330.50 [Jt. Ex. 8-H] and in exchange therefor The Progress Company gave up its interest in the contract dated January 28, 1948. As the result of this transaction, Olympic acquired the exclusive right freely to possess, use, resell or otherwise deal with the 2,250,000 gallons per month. It could sell the gasoline to whomsoever it chose at whatever terms it could arrange. This is a right that it did not possess during the period January 8, 1948, to July 26, 1950. *The movement of that exclusive right from The Progress Company to Olympic was the transfer in this case.*

(e) The Tax Court Failed to Recognize Certain Property Rights Involved in This Case.

We submit that the Tax Court failed to recognize certain property rights involved in this case. The Tax Court admitted that its distinctions might not be "wholly satisfying." [R. 35.]

The Tax Court found that the contract between The Progress Company and Olympic Refining Company dated January 28, 1948, merely created a right on the part of Progress to acquire gasoline from Olympic. To quote from the opinion:

"That contract gave Progress the right to have its gasoline requirements supplied by Olympic, and the evidence indicates that its purchases were made from Olympic. The General-Olympic contract was a separate and distinct transaction. . . ." [R. 32.]

How can it be said that the General-Olympic contract was "separate and distinct" when it was *incorporated by*

reference into the 1948 contract between Olympic and Progress [Ex. 4-D]!

Progress had more than just the right to buy gasoline from Olympic. It had the right buy part of a certain supply of *General Petroleum gasoline*,⁴ and it had the *exclusive right to possess or use or freely to resell* that gasoline to whomsoever it chose at whatever terms it could arrange.

The property right which continued to exist both before and after the “termination” transaction in 1950 and was transferred in that transaction was, we submit, the exclusive right to possess or use or freely to dispose of the 2,250,000 gallons per month which General Petroleum was obligated to supply under the 1945 contract.

For tax purposes property has been defined as “legal relations between persons with respect to a thing.” (*Commissioner v. Golonsky*, 200 F. 2d 72, 74 (3d Cir., 1952), *cert. denied*, 345 U. S. 939 (capital gain case).) The point just made may be better brought out by a closer examination of the legal relations in this case.

In 1945 Olympic entered into a supply contract with General Petroleum. [Jt. Ex. 1-A.] Under that contract, Olympic acquired the right to buy from General Petroleum up to a maximum of 3,500,000 gallons of its gasoline each month at certain prices. There were certain restrictions on resale prices and resale areas. [Jt. Ex. 1-A, p. 4, “General Terms.”] Apart from those restric-

⁴It cannot be overemphasized that the Olympic-Progress agreement of 1948 [Ex. 4-D] incorporated the Olympic-General Petroleum contract of 1945 [Ex. 1-A] by reference. It was General Petroleum's gasoline, and no one else's that was involved here. Progress even gave a release to General Petroleum in the 1950 transaction. [Ex. 8-H.]

tions, *Olympic also acquired the right to resell the entire 3,500,000 gallons to anyone it chose at whatever prices it could get. There was no prohibition against assignment in the agreement.*

The circumstances leading up to the agreement of 1948 between Olympic and The Progress Company [Jt. Exs. 4-D and 5-E] were explained by witness Harold J. Steitz, Vice President of Olympic, in charge of marketing, as follows:

“Q. Could you now tell us briefly the business background leading to the execution of those letters that you have before you? A. Well, we had a supply contract from the General Petroleum Corporation which entitled us to take three and a half million gallons of gasoline per month, and I believe that we had been successful in marketing some million or million and a quarter, or some such figure as that. We were not taking the entire supply, and obviously, of course, we wished to sell it and gain the profit from it, and for that reason we made this contract with The Progress Company, Mr. Leh and Mr. Brown.” [R. 102.]

The agreement of 1948 (January 28, 1948) between Olympic and The Progress Company is disarmingly simple. It consists of two letters [Jt. Exs. 4-D and 5-E] and contained the following provision:

“ . . . the terms, amendments, conditions and provisions [of the 1945 Olympic supply contract with General Petroleum] are incorporated herein by reference and made a part hereof to all intents and purposes as though the same were set forth in full. . . .” [Jt. Ex. 4-D.]

Petitioner Marc D. Leh, who signed the agreement on behalf of The Progress Company regarded it as "an assignment of part of General Petroleum's supply contract with the Olympic Refining." [R. 46.] Regardless of whether this is called a legal assignment of the right to buy 2,250,000 of the 3,500,000 gallons per month from General Petroleum, or an equitable assignment, or a right of first refusal, there can, however, be no question that Olympic gave up its exclusive right to possess or use or freely dispose of the 2,250,000 gallons per month which The Progress Company was entitled to buy, and that The Progress Company acquired the legal right to prevent Olympic from reselling that gasoline to another. This is clear from the provisions of the contracts themselves.

After the 1948 contract was entered into The Progress Company took delivery of the gasoline at the refinery of General Petroleum, and not at any facilities of Olympic. Olympic maintained no gasoline dump or terminal. [R. 83-84.] Nor did it have any refinery in operation. [R. 56.] The Progress Company went directly to General Petroleum for its gasoline and Olympic did not even arrange for pickup and delivery. [R. 102.]

Harold J. Steitz, Vice President of Olympic, testified, as follows:

"Q. Mr. Steitz, did your company handle physically the gasoline that was sold to The Progress Company under those contracts? A. No, we did not. The gasoline was taken at the refinery of General Petroleum, which was our supply point.

Q. Did you arrange for the pickup and delivery of that gasoline or not? A. No." [R. 102.]

The conduct of the parties is thus consistent with the existence of the exclusive right in The Progress Company freely to use or dispose of the gasoline and its non-existence in the hands of Olympic after the 1948 contract.

Between the time of the 1948 contract and the 1950 "Termination" agreement the rights of The Progress Company became more valuable. This was the result of the short supply of gasoline which developed in Southern California between 1948 and 1950. [R. 64, 90-91, 99.] At the beginning of the contract in 1948 very little gasoline was purchased by Progress, but the amount increased progressively, and, by 1950, the full amount permitted was purchased. [R. 52.] The shorter the supply of gasoline, the more profits could be made from such a contract. [R. 58.] According to witness Jack N. Jessen, secretary of General Petroleum [R. 94], "in 1950 when practically all suppliers on the Pacific Coast were short of supply, any supply contract of a substantial amount would have quite a market value, in my opinion, at that particular time." [R. 99.]

The thing that became more valuable was not just the right to acquire General Petroleum gasoline at certain prices; it was the freedom to possess or use or to resell it to whomsoever the holder of that right chose on whatever terms it could arrange (subject to the restrictions on resale prices and areas set forth in the 1945 contract).

On July 26, 1950, The Progress Company received the \$183,330.50 at issue in this case from Olympic Refining Company pursuant to the "Mutual Termination Agreement." [Jt. Ex. 8-H.]

The transaction can be described by paraphrasing the reasoning approved in *Commissioner v. Ray*, 210 F. 2d 390, 391, 392 (5th Cir., 1954), *cert. denied*, 348 U. S. 829. Before the 1950 "Mutual Termination Agreement" The Progress Company had a valuable property right, intangible but nonetheless property, a right to acquire and freely resell 2,250,000 gallons of General Petroleum gasoline per month. This imposed a "servitude" upon the 1945 Olympic-General Petroleum contract and prevented Olympic from freely reselling the 2,250,000 gallons. Before the 1950 transaction, which freed the 1945 Olympic-General Petroleum contract from this servitude, Olympic lacked a valuable right, the right to sell the 2,250,000 gallons per month to whomsoever it chose upon whatever terms it could arrange. True, Olympic had once possessed this right, but it had conveyed the right to The Progress Company in 1948. In the 1950 "Termination" Olympic gave its \$183,330.50 to The Progress Company and in exchange The Progress Company gave to Olympic what it had not immediately theretofore possessed, the right to resell the 2,250,000 gallons per month of General Petroleum gasoline to whomever it chose at whatever terms it could arrange.

The Tax Court's position apparently depends upon a view that The Progress Company's rights when transferred or released to Olympic simply disappear, vanish and become nothing, and, therefore, cannot be the subject of a sale. The concept, it seems overlooks the substantial fact that it is the right freely to resell that is the subject of the transaction. Intangible though the property may be, it is real and valuable to both parties to the transaction: a right to acquire and freely resell General Petroleum gasoline and to prevent Olympic from reselling it

in the hand of The Progress Company, and a right to acquire and freely resell General Petroleum gasoline in the hands of Olympic. The Tax Court's view conceives the right of The Progress Company to acquire General Petroleum gasoline from Olympic as the thing and ignores the status of the right to resell freely as the substance of the sale.

In the view of the Tax Court property rights which disappear or vanish upon a relinquishment, surrender or termination cannot be the subject of a sale. The property rights of every seller can be said to cease, disappear or vanish in every sale. They are simply transferred to the buyer, who holds them himself. In this case the right freely to resell 2,250,000 gallons of General Petroleum gasoline did disappear or vanish on July 26, 1950, as far as The Progress Company was concerned, but it reappeared in the hands of Olympic. In other words, the right was transferred ("sold").

(f) **Economic Realities.**

Economic realities are not ignored in determining the incidence of the federal income tax. *Texas Trailercoach, Inc. v. Commissioner*, F. 2d, 58-1 U. S. T. C. par. 9175 (5th Cir., 1958):

"The closer a tax comes to giving effect to the economic realities, the more bearable it is as the price of national security and of civilization."

In the words of Justice Holmes in *Corliss v. Bowers*, 281 U. S. 376 (1930): ". . . taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed. . . ."

The "Mutual Termination Agreement" between The Progress Company and Olympic Refining Company was entered into on July 26, 1950. [Jt. Ex. 8-H.] Pursuant to that agreement Olympic paid \$183,330.50 to The Progress Company and \$31,669.50 to Olympic Progress Oil Co., a total of \$215,000, which was divided between the two in the proportion to the quantities of gasoline to which each was entitled under their respective contracts. [R. 54, 77, 85-86.]

Five or six days later, on July 31, 1950, and August 1, 1950, Olympic and General Petroleum entered into agreements [Jt. Exs. 9-I and 10-J] under which \$235,000 or \$237,000 was paid by General Petroleum to Olympic [R. 93, 97], and the quantities under the original supply contract of 1945 [Jt. Ex. 1-A], namely, a maximum of 3,500,000 gallons of gasoline per month, were cut in half to 21,000,000 gallons per year or 1,750,000 gallons per month. [Jt. Ex. 9-I; R. 93.]

Witness Jack M. Jessen, secretary of General Petroleum and assistant counsel in the legal department, who had been with the company twenty-two years, and who drafted the agreements [R. 94-95], described the background and significance of that transaction as follows:

"Q. Now, if you will, Mr. Jessen, will you describe briefly the business background and the significance of the transactions which is represented by these documents? A. Well, in 1950, when these various instruments were prepared, Mr. Butterworth of the marketing department advised that due to shortage of supply of General Petroleum Corporation, they were seeking other supplies, and in connection with that, they looked at their present

existing contracts with buyers with the view of trying to repurchase some of that supply in order to relieve the shortage of supply the General Petroleum was faced with at that time.” [R. 95-96.]

Although there can be no precision in the talking about “economic realities,” we might approach economic reality by ignoring legal rights and looking only at the thing, as was done by Mr. Jessen. From that standpoint The Progress Company, Olympic Refining Company and General Petroleum Corporation were concerned with a concrete, tangible, thing which would come into existence in the future, namely, a supply of General Petroleum Corporation gasoline. From an economic standpoint it might be said that it was part of that supply which The Progress Company transferred to Olympic on July 26, 1950, for \$183,330.50.

Viewed, then, from either a legal or an economic standpoint, substantial property rights were transferred by The Progress Company to Olympic for \$183,330.50 on July 26, 1950.

(5) The Function of the Tax Court.

Arthur L. Lawrence, 27 T. C. 713 (No. 82) (January 25, 1957), now on appeal before the 9th Circuit, is a Tax Court case involving the statute of limitations. In its opinion, the Tax Court pointed out that its decision might be contrary to an earlier decision of the Court of Appeals for the Ninth Circuit in *Slaff v. Commissioner*, 220 F. 2d 65 (9th Cir., 1955). It justified its position in refusing to follow the *Slaff* case on the ground that, “. . . a court of national jurisdiction to avoid confusion should follow its own honest beliefs until the Supreme Court decides the point.”

In this case (*Leh* and *Brown*) the following statement appears in the opinion:

“If these distinctions are not wholly satisfying, it should be remembered that the Supreme Court was requested to issue writs of certiorari in a number of these cases in order to clarify the situation, but it refused to do so.” [R. 35.]

Petitioners suggest, with deference, that the distinctions in the Tax Court’s opinion “are not wholly satisfying” because, as applied to the facts in this case, they are incorrect.

If any confusion exists, should it not be resolved in favor of the taxpayers herein—with whom the equities lie? Why should there be capital gain if The Progress Company makes the transaction with a third party and not when it makes the transaction with Olympic?

(6) Conclusion.

The \$183,330.50 received by the taxpayers’ partnership in this case constituted long-term capital gain.

Prayer.

Petitioners respectfully request that the case be reversed.

Respectfully submitted,

JAMES L. WOOD,

Attorney for Petitioners.







APPENDIX A.

Page References to the Record Where the Exhibits Were Identified, Offered and Received as Evidence.

Joint 1-A	)	For Identification In Evidence
Joint 2-B	)	Joint Exhibits 1-A to 12-L, inclu-
Joint 3-C	)	sive, were attached to and referred
Joint 4-D	)	to in the Stipulation of Facts in the
Joint 5-E	)	<i>Leh</i> case [R. 15-16, 18], which was
Joint 6-F	)	identified and received in evidence
Joint 7-G	)	in page 15 of the Reporter's Tran-
Joint 8-H	)	script, which page was not printed
Joint 9-I	)	in the Record.
Joint 10-J)	
Joint 11-K)	
Joint 12-L)	
	)	Joint Exhibits 13-M, 14-N and
	)	15-O, not necessary to Petitioners'
Joint 13-M	)	appeal, were identified and received
Joint 14-N	)	in evidence on pages 15, 16 and 19
Joint 15-O	)	of the Reporter's Transcript, which
	)	pages were not printed in the
	)	Record.

		<u>Identified</u>	<u>Received</u>
Petitioners' 16	)	60	61
Respondents' P	)	72	74
Respondents' Q	)	74	74
Respondents' R	)	74	75
Respondents' S	)	79	80
Respondents' T	)	109	111



APPENDIX B.

References From Tax Court's Findings of Fact to the Record.

<u>Finding at Page</u>	<u>Paragraph beginning</u>	<u>Source in Record</u>
R. 24	"The petitioners . . ."	R. 6, 12, 19, 21. R. 5, 11, 18, 21.
R. 24	"The Progress Company . . ."	R. 6, 12, 19, 21.
R. 24, 25	"Progress . . ."	R. 44, 45, 52, 65, 66, 67.
R. 25	"Olympic . . ."	R. 15, 101, 102.
R. 25	"On November 19, 1945, . . ."	Jt. Ex. 1-A.
R. 25	"During the years . . ."	R. 102.
R. 25, 26	"On January 28, 1948 . . ."	Jt. Ex. 4-D.
R. 26, 27	"The other letter . . ."	Jt. Ex. 5-E.
R. 27	"Prior to . . ."	Jt. Ex. 2-B; R. 17, 49, 50, 51.
R. 27	"Between . . ."	R. 53, 90, 91, 99; R. 53, 56.
R. 27, 28, 29	"On July 26, 1950, . . ."	Jt. Ex. 8-H.
R. 29	"The amount . . ."	R. 80.
R. 29	"On July 31, 1950, . . ."	Jt. Exs. 9-I and 10-J; R. 93, 97.
R. 29, 30	"In the partnership return . . ."	Jt. Exs. 11-K; 12-L, 13-M.



**In the United States Court of Appeals
for the Ninth Circuit**

MARC D. LEH AND L. WAIVE LEH, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**DAVID E. BROWN AND CHRISTOBEL H. BROWN,
PETITIONERS**

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**On Petitions for Review of the Decisions of the
Tax Court of the United States**

BRIEF FOR THE RESPONDENT

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FILED

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PAUL P. O'BRIEN, CLERK



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The cancellation of taxpayers' supply contract was not a sale or exchange within the meaning of Section 117(a) (4) and (j) of the Internal Revenue Code of 1939, and the amount received for the cancellation was properly held taxable as ordinary income rather than as capital gain..	9
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**In the United States Court of Appeals
for the Ninth Circuit**

No. 15797

MARC D. LEH AND L. WAIVE LEH, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

DAVID E. BROWN AND CHRISTOBEL H. BROWN,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**On Petitions for Review of the Decisions of the
Tax Court of the United States**

BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 23-35) are reported at 27 T.C. 892.

JURISDICTION

These petitions for review (R. 38-42) involve federal income taxes for the taxable year 1950. On April 23, 1954, the Commissioner of Internal Rev-

enue mailed to the taxpayers Marc D. Leh and L. Waive Leh notice of a deficiency in the total amount of \$24,669.86 and to taxpayers David E. Brown and Christobel H. Brown, notice of a deficiency in the total amount of \$24,669.86. (R. 5, 19.) Within 90 days thereafter and on July 16, 1954, taxpayers filed petitions with the Tax Court for redetermination of the deficiencies under the provisions of Section 272 of the Internal Revenue Code of 1939. (R. 3, 4.) The decisions of the Tax Court were entered June 20, 1957. (R. 36, 37.) The case is brought to this Court by petitions for review filed September 16, 1957. (R. 38-42.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED

Whether the cancellation of a contract under which taxpayers had the right to purchase a fixed amount of gasoline per month constituted a "sale or exchange" within the meaning of Section 117(a)(4) and (j) of the Internal Revenue Code of 1939, and thus entitles taxpayers to treat the consideration received for the cancellation as capital gain rather than ordinary income.

STATUTES INVOLVED

These appear in the Appendix, *infra*.

STATEMENT

The facts as found by the Tax Court (R. 24-30), some of which were stipulated (R. 14-18), may be briefly summarized as follows:

The Progress Company (hereinafter referred to as Progress) was a general partnership the members of which were taxpayers Marc D. Leh and David E. Brown¹ who shared profits and losses equally. It was formed in 1940 and was thereafter engaged in various businesses, including the marketing of petroleum products during the years 1947, 1948, 1949 and 1950. (R. 24-25.)

Olympic Refining Company (hereinafter referred to as Olympic) is a corporation also engaged in marketing petroleum products. On November 19, 1945, Olympic entered into a contract with General Petroleum Corporation (hereinafter referred to as General) pursuant to which Olympic was obligated to purchase its entire requirements of gasoline from General and the latter was obligated to supply Olympic's requirements of gasoline and other petroleum products up to a maximum of 3,500,000 gallons per month. This contract contained an expiration date of January 1, 1951, but it also provided for automatic extensions from year to year subject to termination upon six months notice by either party. In 1946 and 1947, Olympic's purchases under this contract (hereinafter referred to as the General-Olympic contract), averaged 1,000,000 to 1,250,000 gallons per month. (R. 25.)

On January 28, 1948, Progress entered into a contract with Olympic (hereinafter referred to as the

¹ L. Waive Leh and Christobel H. Brown are the wives of the respective taxpayers named above and are parties herein solely because they filed returns with their husbands for the years involved. Consequently only Marc D. Leh and David E. Brown will be referred to as the taxpayers herein.

Progress-Olympic contract) which was set forth in two letters of that date. (R. 25.) One letter, from Olympic to Progress, read as follows (R. 25-26):

We are pleased to submit below our proposal to serve you with your requirements of our gasoline.

Your signature of acceptance acknowledges that you have read and are familiar with the terms and conditions of that certain agreement between Olympic Refining Company and the General Petroleum Corporation of California, dated November 19, 1945, and that the terms, amendments, conditions and provisions are incorporated herein by reference and made a part hereof to all intents and purposes as though the same were set forth in full, except that:

1. The quantity of gasoline will be two and one-quarter million gallons, 10% more or less, subject to our option;

2. The prices you will pay us will be one-half cents per gallon greater than the prices which are set forth in said agreement; and

3. Gasolines purchased hereunder will not be resold for delivery into the States of Washington and Oregon nor within the territory in the State of California which is embraced within exclusive distributor contracts with the Olympic Refining Company as follows: San Francisco, San Jose, Glendale, Pasadena, and San Diego.

The other letter, from Progress to Olympic, read as follows (R. 26-27):

In consideration of the gasoline contract which we have entered into with your company as of this date, it is understood that, in the event the Olympic Refining Company extends and/or

makes a contract for gasolines with the General Petroleum Corporation of California and/or any other supplier of petroleum products, The Progress Co. shall have an extension of its agreement on the same terms and conditions, with the exceptions noted in our agreement of this date.

Likewise, if The Progress Co. should negotiate a contract for gasoline similar to the above referred to type of contract with the General Petroleum Corporation of California and/or any other supplier of petroleum products, The Progress Co. will pay to the Olympic Refining Company one-half ($\frac{1}{2}\phi$) cent per gallon during the life of said contract.

Prior to the execution of the foregoing contract, Progress and Olympic had entered into a "Distributors Agreement" under which Progress was entitled to 350,000 gallons of gasoline per month. In 1948, this agreement was assigned by Progress to Olympic-Progress Oil Co., a corporation controlled by taxpayers. (R. 27.)

Between 1948, when the Progress-Olympic contract was executed, and 1950, the gasoline market expanded; by 1950, gasoline was in short supply in the Southern California area. General, in order to reduce its supply commitments, entered into negotiations with Olympic in 1950 to obtain a reduction of its commitment under the General-Olympic contract; Olympic, in turn, sought reduction or elimination of its commitment to Progress. (R. 27.)

On July 26, 1950, an agreement entitled "Mutual Termination Agreement" was entered into by Progress, as first party, Olympic-Progress Oil Company,

as second party, and Olympic, as third party. (R. 27-28.) This agreement, after referring to prior agreements of the parties, including the Progress-Olympic contract and the distributors agreement, provided in part as follows (R. 28-29):

1. Each and all of said agreements above described are hereby mutually declared to be cancelled and terminated as of the close of business on the 31st day of July, 1950 and declared to be of no further force or effect.

2. First Party and Second Party hereby release and discharge Third Party and General Petroleum Corporation of and from any and all duties, claims, liabilities or obligations arising out of or in connection with said agreements above described or otherwise.

3. Third Party releases and discharges First Party of and from any and all duties, claims, liabilities or obligations arising out of or in connection with said agreements above described or otherwise; excepting however, that Third Party does not release First Party of or from the following indebtedness:

(a) The indebtedness in the sum of \$255,277.80 owed by First Party to Third Party as of the close of business on the 24th day of July, 1950, for petroleum products theretofore sold and delivered by Third Party to First Party; and

(b) Any indebtedness of First Party to Third Party for petroleum products sold and delivered by Third Party to First Party up to and including the 31st day of July, 1950, computed at the same prices used in

the computation of said existing indebtedness described in subparagraph (a) above;

First Party agrees to pay said indebtedness or any remaining balance thereof to Third Party on or before the 3rd day of August, 1950.

* * * *

5. In consideration of the termination of said agreements, as provided in paragraph 1 hereinabove, and in consideration of the releases herein provided for, Third Party shall pay to First Party the sum of \$183,330.50, and to Second Party the sum of \$31,669.50; which said sums may, at the election of Third Party, be paid in cash to Second and Third Parties respectively, or be paid by crediting the said sums respectively against the respective indebtedness of First and Second Parties described in paragraphs 3 and 4 hereinabove, which election shall be made by Third Party on or before July 31st.

The sum of \$183,330.50 was paid to Progress in 1950 by crediting that sum to its account with Olympic for gasoline previously purchased under the Progress-Olympic contract. (R. 29.)

On July 31, 1950, General and Olympic entered into an agreement providing for the termination of the General-Olympic contract, and on August 1, 1950, they executed a new agreement pursuant to which Olympic was entitled to purchase 1,750,000 gallons of gasoline per month. General paid Olympic approximately \$235,000 when these agreements were executed. (R. 29.)

The sum of \$183,330.50 was reported as long-term capital gain on the partnership return filed by Prog-

ress for 1950 and on the individual returns filed by taxpayers. (R. 29-30.) The Tax Court held that the agreement of July 26, 1950, was not intended to effect a sale by Progress to Olympic of the former's rights under the Progress-Olympic contract, but was intended to terminate and cancel those rights. It held that under that contract, the rights of Progress "came to an end and vanished" and that there was no sale or exchange necessary as a basis for a capital gain. The determination of the Commissioner that the amount received under the agreement of July 26, 1950 was ordinary income was accordingly sustained. (R. 30-35.)

SUMMARY OF ARGUMENT

This case involves the effect of the cancellation of a contract under which taxpayers' partnership (Progress) was entitled to purchased 2,250,000 gallons of gasoline per month, and the treatment to be accorded the lump-sum payment received by taxpayers as consideration for such cancellation. The decision of the Tax Court that the sum received is taxable as ordinary income because the cancellation transaction did not constitute a "sale or exchange" of property, and is thus not capital gain, is supported by abundant judicial authority. The cancellation of a simple contract right, here the right to purchase a stipulated quantity of gasoline, does not effect a transfer or "sale or exchange" of such right to the seller. The cancellation agreement effects a destruction of the duty of the seller and the rights of the purchaser. The rights of the taxpayers (purchasers) came to an end and disappeared.

Moreover, the consideration received by taxpayers for the release of their partnership's rights to purchase gasoline was in essence but a substitute for the resale profits (ordinary income) which taxpayers would have realized if the contracts had been fully performed, instead of terminated. In holding that the amount received constituted ordinary income to taxpayers, the Tax Court properly distinguished between cases involving releases of simple contract rights and those involving surrender of more substantial property rights, such as the leasehold interest of a tenant. The Tax Court also examined the circumstances attendant to the execution of the cancellation agreement and correctly concluded that the parties intended to effect a cancellation and termination of the contract rights, not a transfer of such rights by taxpayers (Progress) to Olympic.

ARGUMENT

The Cancellation of Taxpayers' Supply Contract Was Not A Sale Or Exchange Within the Meaning of Section 117(a)(4) and (j) of the Internal Revenue Code of 1939, and the Amount Received for the Cancellation Was Properly Held Taxable As Ordinary Income Rather Than As Capital Gain

The sole question presented in this case is whether the amount received by taxpayers' partnership (Progress) from their supplier (Olympic) for agreeing to the cancellation of the contract under which Progress was entitled to purchase 2,250,000 gallons of gasoline per month from Olympic is taxable as ordinary income under Section 22(a) of the Internal Revenue Code of 1939 (Appendix, *infra*), as the Tax Court held, or as capital gain from the "sale or ex-

change" of property within the meaning of Section 117(a)(4) and (j) (Appendix, *infra*), as taxpayers contend. This question has been decided in the Commissioner's favor in *Commissioner v. Starr Bros.*, 204 F. 2d 673 (C.A. 2d); *Commissioner v. Pittston Co.* (C.A. 2d), decided February 11, 1958 (58-1 U.S.T.C., par. 9284); *Roscoe v. Commissioner*, 215 F. 2d 478 (C.A. 5th); *Appalachian Electric Power Co. v. United States* (C. Cls.), decided January 15, 1958 (58-1 U.S.T.C., par. 9196); *McCartney v. Commissioner*, 12 T.C. 320. See also *General Artists Corp. v. Commissioner*, 205 F. 2d 360 (C.A. 2d), certiorari denied, 346 U.S. 866. The reasoning of these cases is fully applicable here and they are persuasive authority for the position taken by the Tax Court below.

Under Section 117(a)(4) and (j) of the 1939 Code "long-term capital gain" is defined as the gain from the "sale or exchange" of capital assets or of "property used in the trade or business". The Tax Court determined that the rights of Progress, and of taxpayers, under the Progress-Olympic contract constituted "property used in the trade or business" and that determination is not in dispute before this Court. The decisive issue is whether there was a "sale or exchange" of such property when the Progress-Olympic contract was cancelled by agreement of the parties in 1950 and Progress received the sum of \$183,330.50 as consideration for such cancellation.

The several courts which have decided the cases cited above are in agreement that in situations such as the one here presented, the cancellation or termi-

nation of the pre-existing relationship of the parties ended the duty of the promisor and destroyed the rights of the promisee. In such case, it may truly be said that the rights of the promisee (Progress) "came to an end and varnished". *Commissioner v. Starr Bros.*, 204 F. 2d 673, 674 (C.A. 2d). If the rights of the promisee are thus destroyed, the cancellation or termination of the pre-existing agreement is not a "sale or exchange" of property which would permit the amount received to be treated as capital gain under Section 117, rather than as ordinary income under Section 22(a).

In *Commissioner v. Starr Bros.*, *supra*, the taxpayer, a retailer, had entered into a contract with a drug manufacturer (United) under which it was appointed exclusive sales agent for such manufacturer's products in New London, Connecticut. Taxpayer agreed to sell the manufacturer's products at retail at prices not less than those set by the manufacturer. In 1943, the taxpayer received \$6,394.57 for the cancellation of this contract and entered into a non-exclusive sales agency contract with the manufacturer. The taxpayer then contended that the cancellation transaction was a "sale or exchange" of property entitled to treatment as capital gain. The Court of Appeals for the Second Circuit, relying on the analogous reasoning employed in *Bingham v. Commissioner*, 105 F. 2d 971 (C.A. 2d), and the decision of the Supreme Court in *Hort v. Commissioner*, 313 U.S. 28, held that the amount received was properly taxable as ordinary income, stating (p. 674):

Undoubtedly the taxpayer's rights under the

1903 contract were property; and we will assume arguendo, as does the Commissioner, that they were a capital asset. The decisive issue is whether there was a "sale or exchange" of such capital asset when the contract was terminated in 1943. To refer to the contract as a grant of a "franchise" tends, we think, to becloud analysis of the legal relations. What the taxpayer gave in return for the cash payment was *a release of United's contract obligation*, chief of which was its promise not to sell its products to other dealers in New London. Such release not only ended the promisor's previously existing duty but also destroyed the promisee's rights. *They were not transferred to the promisor; they merely came to an end and vanished.*" (Italics supplied.)

More recently in *Commissioner v. Pittston Co.* (C.A. 2d), decided February 11, 1958 (58-1 U.S.T.C., par. 9284), the same court reached a like result in a case closely paralleling the present controversy. The taxpayer in *Pittston* had entered into a contract with a coal mining company pursuant to which the taxpayer agreed to purchase and the coal company agreed to sell the entire output of designated mining property. In 1949, in exchange for a payment of \$500,000 to the taxpayer, the coal company "acquired" the taxpayer's rights under the previous contract, and the taxpayer contended that this was a "sale or exchange" of property and thus capital gain. Notwithstanding the artful language employed by the parties, the court concluded that the payment was "solely for the termination of the right-duty relationship between the two parties to the agreement" and

determined that the amount received must be taxed as ordinary income.

A similar parallel is also found in *Appalachian Electric Power Co. v. United States* (C. Cls.), decided January 15, 1958 (58-1 U.S.T.C. par. 9196), in which the taxpayer and the TVA were parties to a contract under which each agreed to supply the other with surplus electric energy. In 1945, the parties executed an agreement cancelling their prior contract and providing for the payment by TVA to the taxpayer of \$180,000 for the remaining years of the earlier contract. The Court of Claims, overruling the taxpayer's assertions that the transaction constituted a "sale or exchange" of property, held that the transaction did not constitute a transfer by taxpayer to the TVA and that the TVA did not thereby acquire the right to supply electric power to itself. The amount received was therefore held taxable as ordinary income, not capital gain. See also *Roscoe v. Commissioner*, 215 F. 2d 478 (C.A. 5th), wherein it was determined that the amount received in exchange for cancellation of an exclusive real estate sales agency contract was taxable as ordinary income and was not a "sale or exchange" of property entitled to treatment as capital gain.²

² The rationale employed in the *Starr*, *Pittston*, *Appalachian* and *Roscoe* cases, *supra*, finds support in the Supreme Court's decision in *Fairbanks v. United States*, 306 U.S. 436. There the Court held that the payment and discharge of bonds by the obligor corporation prior to maturity constituted (p. 437) "neither sale nor exchange within the commonly accepted meaning of the words." See also *Bingham v. Commissioner*, 105 F. 2d 917 (C.A. 2d), and *Hale v.*

In both the *Pittston* and *Appalachian* cases, *supra*, the courts noted that the contracts involved, if performed as originally agreed, would have resulted in the receipt by the taxpayers of profits which would have been taxable as ordinary income. In their view, the amounts received by the taxpayers pursuant to the cancellation agreements represented nothing more than the earlier receipt of part of that anticipated profit and should therefore be taxed on the same basis, namely, as ordinary income.

The facts of the instant case present fully as persuasive a situation for a determination that taxpayers, upon cancellation of the Progress-Olympic contract, received the \$183,330.50 as ordinary income. Olympic agreed to sell to Progress 2,250,000 gallons of gasoline per month at designated prices pursuant to a contract which expired on January 1, 1951, but was subject to automatic extension from year to year. (R. 25-27.) As in the cases cited, the Progress-Olympic contract did not require Progress or taxpayers to render personal services, nor did it create an employer-employee relationship. In return for the lump-sum payment, taxpayers (Progress) gave Olympic a release of the latter's supply obligations. As the Tax Court held ³ (R. 34):

Helvering, 85 F. 2d 819 (C.A. D.C.), holding that there is neither a sale nor an exchange when the holder of a note surrenders it to the maker upon payment.

³ The Tax Court agreed with taxpayers that the fact that the cancellation agreement was denominated a "Mutual Termination Agreement" was not determinative. It considered "not only the provisions of the agreement but also the attendant facts and circumstances shown by the evidence." (R. 33.)

This release not only ended Olympic's duty to supply this gasoline but also destroyed Progress' rights under the Progress-Olympic contract. They were not transferred to Olympic; they "merely came to an end and vanished." Cf. *Commissioner v. Starr Bros.*, 204 F. 2d 763, 674 (C.A. 2d).

Furthermore, as in *Pittston* and *Appalachian*, *supra*, the payment received by Progress for the release of its contract right to purchase and resell Olympic's gasoline was in reality but a substitute for the resale profits (ordinary income) which taxpayers would have realized if the contracts had been performed instead of terminated. Had Olympic refused to perform its obligations under the contract, the taxpayer would have been entitled to damages corresponding to the loss of profits occasioned by such refusal. Such damages, representing lost profits, would of course be taxable as ordinary income. The amount received by taxpayers from Olympic for cancelling the Olympic-Progress contract merely took the place of what would have been taxed as ordinary income. *Hort v. Commissioner*, 313 U.S. 28. Cf. *Commissioner v. McCue Bros. & Drummond, Inc.*, 210 F. 2d 752 (C.A. 2d), certiorari denied, 348 U.S. 829.⁴

⁴ In the *Hort* case, the lessee made a lump-sum payment in exchange for cancellation of the unexpired portion of the lease. The taxpayer-lessor claimed capital gains treatment on the amount received. The Supreme Court held the payment to be ordinary income, stating (pp. 31-32):

Where, as in this case, the disputed amount was essentially a substitute for rental payments which § 22(a)

The "attendant facts and circumstances shown by the evidence", upon which the Tax Court relied (R. 33), fully support the foregoing analysis. In 1950, when the cancellation agreement was executed, gasoline was in short supply in the Southern California area in which Olympic and Progress were engaged in business and Olympic sought reduction or elimination of its supply commitment under the Progress-Olympic contract. (R. 27.) As taxpayer Leh testified (R. 58), "the shorter the supply position of gasoline, the more profits would be made." Moreover, both taxpayers testified that Progress had claims against Olympic arising out of past deliveries of gasoline. Leh testified (R. 60), "I think I know what the word 'claims' means to me. We had a beef about the prices." He referred to claims against Olympic because of the latter's actions in raising or attempting to raise the price of gasoline. (R. 59-60, 76-77.) Taxpayer Brown characterized these claims as arising from the fact that Olympic was unable or refused to supply the amounts set forth in the supply contract. (R. 107-108.) Significantly, the "Mutual Termination Agreement" provides for the release of Olympic by Progress "of and from any and all duties, claims,

expressly characterizes as gross income, it must be regarded as ordinary income, and it is immaterial that for some purposes the contract creating the right to such payments may be treated as "property" or "capital".

* * * *

The cancellation of the lease involved nothing more than relinquishment of the right to future rental payments in return for a present substitute payment and possession of the leased premises.

liabilities or obligations" arising out of the contracts between the parties. (R. 27-28.)

These facts led the Tax Court to conclude (R. 33-34) that the cancellation agreement of July 26, 1950—

was not intended to effect a sale by Progress of its rights under the Progress-Olympic contract to Olympic; that Olympic was desirous of cancelling and terminating those rights; and that the amount of \$183,330.50 was paid to Progress in consideration for their cancellation and termination.

It is clear from this evidence that in executing the "Mutual Termination Agreement" taxpayers took into account the profits (ordinary income) to be expected if the Olympic-Progress contract was performed, as well as the claims of Progress against Olympic for loss of profits (ordinary income) under that contract arising from breach of contractual obligations. Such profits, or lost profits, would be taxable as ordinary income and the amount received by taxpayers merely took the place of lost profits and is also taxable as ordinary income. *Hort v. Commissioner, supra; Commissioner v. Pittston Co., supra; Appalachian Electric Power Co. v. United States, supra.*

Taxpayers assert (Br. 15-19) that the Progress-Olympic contract was, in effect, an assignment from Olympic to Progress of Olympic's rights under the General-Olympic contract to the extent of 2,250,000 gallons of gasoline per month and that the "Mutual Termination Agreement" of July 26, 1950, was a transfer of this right from ~~Olympic to Progress~~, for

Progress to Olympic

guished between the cases involving transfers of leasehold interests and those involving releases of ordinary contract rights. It referred to its prior decisions in *Commissioner v. Starr Bros.*, 204 F. 2d 673, and *General Artists Corp. v. Commissioner*, 205 F. 2d 360, certiorari denied, 346 U.S. 866, and stated (p. 753):

In these cases no "sale or exchange" within the meaning of the statute was found because the contractual right was not transferred, but was released and merely vanished. However, we think the right of possession under a lease or otherwise, is a more substantial property right which does not lose its existence when it is transferred.

The Fifth Circuit recognized a similar distinction. Its decision in *Commissioner v. Ray*, *supra* (involving the surrender of a leasehold interest), was followed by *Roscoe v. Commissioner*, 215 F. 2d 478, which held that the amount received for cancellation of an exclusive real estate sales agency contract was taxable as ordinary income under Section 22(a) of the 1939 Code. In *Roscoe*, the court approved the rationale of *Commissioner v. Starr Bros.*, *supra*, and *General Artists Corp. v. Commissioner*, *supra*. This judicially-drawn distinction forms the basis of an administrative ruling to the effect that the consideration received for a release of simple contract rights, as distinguished from the surrender by a lessee of a leasehold interest, constitutes ordinary income under Section 22(a), Rev. Rul. 56-531, 1956-2 Cum. Bull. 983.

Similarly, in *Commissioner v. Goff*, *supra*, a right in specific tangible property, as distinguished from

a simple contract right, was involved. The taxpayer in that case owned some hosiery machines which he installed in a hosiery mill under an agreement obligating the mill to pay a fixed sum per dozen pairs of hosiery for the use of the machines and to sell the output to the taxpayer at a stipulated price. At a later date, the mill paid the taxpayer an agreed sum in exchange for the right to use the machines free of the obligation to pay such use charges. The Third Circuit noted (pp. 876-877) that the right there transferred was "a right connected with the use of specific tangible property, that is, the machines themselves." It distinguished the *Starr Bros.* and *General Artists Corp.* cases, *supra*, on the ground that the contract rights there involved were less substantial.

In *McAllister v. Commissioner*, *supra*, the Second Circuit held that the transfer by a life tenant of his life interest to the remainderman for a sum of money was a sale. This case was expressly distinguished by the same court in its later decision in *Starr Bros.*, *supra*, as having been decided under the rule of *Blair v. Commissioner*, 300 U.S. 5 (holding that a transfer by a life tenant of a portion of the income for the duration of the life estate rendered the income taxable to the transferee as beneficiary of the life estate to the extent of the transfer).

With all due candor, we cannot state that the decision of the Tenth Circuit in *Jones v. Corbyn*, *supra*, is distinguishable. That case involved the release of an exclusive insurance agency contract for a lump-sum payment. The court held that such transaction

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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MARCH, 1958.

APPENDIX

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) *General Definition*.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal services, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * *

(26 U.S.C. 1952 ed., Sec. 22.)

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *Definitions*.—As used in this chapter—

(1) [As amended by Sec. 115(b), Revenue Act of 1941, c. 412, 55 Stat. 687, and Sec. 151(e), Revenue Act of 1942, c. 619, 56 Stat. 798] *Capital assets*.—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property, used in the trade or business, of a character which

is subject to the allowance for depreciation provided in section 23(1), or an obligation of the United States or any of its possessions, or a State or Territory, or any political subdivision thereof, or of the District of Columbia, issued on or after March 1, 1941, on a discount basis and payable without interest at a fixed maturity date not exceeding one year from the date of issue, or real property used in the trade or business of the taxpayer;

* * * *

(4) [As amended by Sec. 150(a)(1), Revenue Act of 1942, *supra*] *Long-term capital gain*.—The term “long-term capital gain” means gain from the sale or exchange of a capital asset held for more than 6 months, if and to the extent such gain is taken into account in computing net income;

* * * *

(j) [As added by Sec. 151(b), Revenue Act of 1942, *supra*] *Gains and Losses From Involuntary Conversion and From the Sale or Exchange of Certain Property Used in the Trade or Business*.—

(1) *Definition of property used in the trade or business*.—For the purposes of this subsection, the term “property used in the trade or business” means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(1), held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind

which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business. * * *

(2) *General rule.*—If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat of imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. * * *

* * *

(26 U.S.C. 1952 ed., Sec. 117.)



No. 15797

United States
Court of Appeals
for the Ninth Circuit

MARC D. LEH and L. WAIVE LEH,
Petitioners,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DAVID E. BROWN and CHRISTOBEL H.
BROWN, Petitioners,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petitions to Review Decisions of The Tax Court
of the United States

JAN 10 1958

PAUL F. GARDEN, CLERK



No. 15797

United States
Court of Appeals
for the Ninth Circuit

MARC D. LEH and L. WAIVE LEH,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Attorneys for Respondent.



The Tax Court of the United States

Docket No. 53878

MARC D. LEH and L. WAIVE LEH, Husband
and Wife, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1954

July 16—Petition received and filed, taxpayer notified, fee paid.

* * * * *

1956

April 9 & 10—Respondent's oral motion to consolidate Docket No. 53897, for trial—Granted.

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1957

Jun. 20—Decision entered, Judge Raum, Div. 11.
Served 6/21/57.

Sep. 16—Petition for Review by U. S. Court of Appeals, 9th Circuit filed by petitioner.

Sep. 17—Proof of Service filed.

Sep. 30—Designation of contents of record on appeal with proof of service thereon, filed.

* * * * *

The Tax Court of the United States

Docket No. 53879

DAVID E. BROWN and CHRISTABEL H.
BROWN, Husband and Wife, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1954

July 16—Petition received and filed. Taxpayer notified. Fee paid.

* * * * *

1957

Jun. 20—Decision entered, Judge Raum, Div. 11.
Served 6/21/57.

Sep. 16—Petition for review by U. S. Court of Appeals, 9th Circuit filed by petitioner.

Sep. 17—Proof of Service filed.

Oct. 9—Designation of contents of record on appeal with proof of service thereon, filed.

[Title of Tax Court and Docket No. 53878.]

AMENDED PETITION

The above named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency (Ap:LA:AA-CTF 90D:GCE) dated

April 23, 1954, and as a basis of their proceeding, allege as follows:

1. Petitioners are individuals with principal office at 620 West Anaheim Street, Long Beach, California. The return for the period herein involved was filed with the Collector for the Sixth District of California.

2. The Notice of Deficiency (a copy of which is attached to the original petition herein and marked Exhibit A) was mailed to petitioners on April 23, 1954.

3. The deficiency determined by the Commissioner is in income taxes for the calendar year 1950 in the amount of \$24,669.86, all of which is in dispute.

4. The determination of tax set forth in the said Notice of Deficiency is based upon the following errors:

(a) Respondent erroneously determined that the sum of \$183,330.50 paid by Olympic Refining Company to the Progress Company, a partnership in which petitioner Marc D. Leh held a 50 per cent interest, constituted ordinary income rather than capital gain as reported on petitioners' return.

(b) Respondent erroneously failed to allow a net operating loss deduction based upon a net operating loss carryback from the year 1951 in the amount of \$8,571.44.

5. The facts upon which petitioners rely are as follows:

(a) Petitioners are and at all times material hereto were husband and wife.

(b) At all times pertinent hereto the Progress Company was a partnership composed of petitioner Marc D. Leh and David E. Brown. Petitioner Marc D. Leh was entitled to 50 per cent of the profits and chargeable with 50 per cent of the losses thereof, and his distributive share of the gains and losses of the partnership from sales or exchanges of capital assets held for more than six months was 50 per cent.

(c) On or about July 26, 1950, the Progress Company sold property constituting a capital asset. Said property had been held continuously by the Progress Company for more than six months, to wit, since January 28, 1948.

(d) Said property consisted of a written contract relating to the purchase of certain quantities of gasoline at specified prices, together with those rights created or transferred thereby.

(e) The terms of said contract were embodied in two letter agreements executed January 28, 1948; copies of said letter agreements are attached hereto marked Exhibit C and Exhibit D, and are made a part hereof by reference.

(f) The gain realized by the Progress Company from such sale was \$183,330.50.

(g) Petitioners sustained a net operating loss attributable to the operation of trades and businesses regularly carried on by petitioners in the amount of \$8,571.44 during the year 1951. Said loss was a net operating loss carryback for the preced-

ing year, 1950, and constituted a net operating loss deduction for 1950 in that amount. Petitioners filed with respondent on March 15, 1954, a claim of refund on Form 843 for the calendar year 1950. Said claim of refund is attached to the original petition herein, marked Exhibit B. The facts stated in said claim for refund are incorporated herein by reference as if set forth herein in full.

Wherefore, petitioners pray that this Court hear the proceeding and determine, (a) that respondent's determination of the tax is erroneous insofar as the sum of \$183,330.50 paid by Olympic Refining Company to the Progress Company is treated by respondent as ordinary income; (b) that no deficiency exists in petitioners' income tax liability for the taxable year ending December 31, 1950; (c) that petitioners' claim of refund should be allowed, that petitioners are entitled to an additional deduction of \$8,571.44 in calendar year 1950, and that petitioners are entitled to a refund of \$2,475.62 (or such greater amount as may be legally refundable) with interest; (d) for such other and further relief as the Court deems just.

Dated: February 27, 1956.

/s/ JAMES L. WOOD,
Counsel for Petitioners.

Duly Verified.

EXHIBIT "C"

OLYMPIC REFINING COMPANY

2425 California Avenue

Long Beach, Cal.

January 28, 1948

The Progress Co.,
530 West 6 Street,
Los Angeles, California.

Gentlemen:

We are pleased to submit below our proposal to serve you with your requirements of our gasoline.

Your signature of acceptance acknowledges that you have read and are familiar with the terms and conditions of that certain agreement between Olympic Refining Company and the General Petroleum Corporation of California, dated November 19, 1945, and that the terms, amendments, conditions and provisions are incorporated herein by reference and made a part hereof to all intents and purposes as though the same were set forth in full, except that:

1. The quantity of gasoline will be two and one-quarter million gallons, 10% more or less, subject to our option;
2. The prices you will pay us will be one-half cent per gallon greater than the prices which are set forth in said agreement; and,
3. Gasolines purchased hereunder will not be resold for delivery into the States of Washington and Oregon nor within the territory in the State of

California which is embraced within exclusive distributor contracts with the Olympic Refining Company as follows: San Francisco, San Jose, Glendale, Pasadena, and San Diego.

Very truly yours,

OLYMPIC REFINING COMPANY,

/s/ By H. J. STEITZ,

H. J. Steitz,

Vice-President.

Acceptance:

THE PROGRESS CO.,

/s/ By MARC D. LEH,

Marc D. Leh.

EXHIBIT "D"

THE PROGRESS COMPANY

530 West Sixth Street

Los Angeles, California

January 28, 1948

Olympic Refining Company,
2425 California Avenue,
Long Beach, California.

Gentlemen:

In consideration of the gasoline contract which we have entered into with your company as of this date, it is understood that, in the event the Olympic Refining Company extends and/or makes a contract for gasolines with the General Petroleum Corporation of California and/or any other supplier of petroleum products, The Progress Co. shall have an

extension of its agreement on the same terms and conditions, with the exceptions noted in our agreement of this date.

Likewise, if The Progress Co. should negotiate a contract for gasolines similar to the above referred to type of contract with the General Petroleum Corporation of California and/or any other supplier of petroleum products, The Progress Co. will pay to the Olympic Refining Company one-half ($\frac{1}{2}$ c) cent per gallon during the life of said contract.

Very truly yours,

THE PROGRESS CO.,

/s/ By MARC D. LEH,

Marc D. Leh.

MDL:o

Acceptance:

OLYMPIC REFINING COMPANY,

/s/ By H. J. STEITZ,

H. J. Steitz,

Vice-President.

[Endorsed]: T.C.U.S. Filed April 9, 1956.

[Title of Tax Court and Docket No. 53878.]

AMENDMENT TO AMENDED PETITION

Come now, the petitioners and amend their Amended Petition herein as follows:

By striking out the words "constituting a capital asset" in paragraph 5(c) thereof, and substituting therefor the words "used in its trade or business."

Dated: April 4, 1956.

/s/ JAMES L. WOOD,
Counsel for Petitioners.

Duly Verified.

[Endorsed]: T.C.U.S. Filed April 9, 1956.

[Title of Tax Court and Docket No. 53878.]

ANSWER TO AMENDED PETITION

Comes now the Commissioner of Internal Revenue, by his attorney, John Potts Barnes, Chief Counsel, Internal Revenue Service, and for answer to the amended petition filed by the above-named petitioners, admits and denies as follows:

1. Admits that the petitioners are individuals and that the return for the period herein involved was filed with the Collector for the Sixth District of California; denies the remainder of the allegations contained in paragraph 1 of the amended petition.

2. Admits the allegations contained in paragraph 2 of the amended petition.

3. Admits that the deficiency determined by the Commissioner is in income taxes for the calendar year 1950 in the amount of \$24,669.86; denies the remainder of the allegations contained in paragraph 3 of the amended petition.

4(a) and (b). Denies that the respondent erred as alleged in subparagraphs (a) and (b) of paragraph 4 of the amended petition.

5 (a) and (b). Admits the allegations contained in subparagraphs (a) and (b) of paragraph 5 of the amended petition.

(c) and (d). Denies the allegations contained in subparagraphs (c) and (d) of paragraph 5 of the amended petition.

(e). Denies that the terms of said contract were embodied in two letter agreements executed January 28, 1948; admits the remaining allegations contained in subparagraph (e) of paragraph 5 of the amended petition.

(f). Denies the allegations contained in subparagraph (f) of paragraph 5 of the amended petition.

(g). Admits the allegations contained in subparagraph (g) of paragraph 5 of the amended petition, except that the respondent denies that the facts stated in said claim for refund are incorporated herein by reference as if set forth herein in full.

6. Denies generally and specifically each and every allegation in the amended petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's

determination be approved and the petitioner's appeal denied.

/s/ JOHN POTTS BARNES, REM,
Chief Counsel, Internal Revenue Service.

Of Counsel: Melvin L. Sears, Regional Counsel;
E. C. Crouter, Assistant Regional Counsel;
R. E. Maiden, Jr., Special Assistant to the Regional Counsel; G. E. Constable, Attorney, Internal Revenue Service.

[Endorsed]: T.C.U.S. Filed April 9, 1956.

[Title of Tax Court and Docket No. 53878.]

ANSWER TO AMENDMENT TO AMENDED
PETITION

Comes now the Commissioner of Internal Revenue, by his attorney, John Potts Barnes, Chief Counsel, Internal Revenue Service, and for answer to the amendment to the amended petition filed by the above-named petitioners, denies all of the allegations therein.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioners' appeal denied.

/s/ JOHN POTTS BARNES, ECC,
Chief Counsel, Internal Revenue Service.

Of Counsel: Melvin L. Sears, Regional Counsel;
E. C. Crouter, Assistant Regional Counsel;
R. E. Maiden, Jr., Special Assistant to the Regional Counsel; G. E. Constable, Attorney, Internal Revenue Service.

[Endorsed]: T.C.U.S. Filed April 9, 1956.

[Title of Tax Court and Docket No. 53878.]

STIPULATION OF FACTS

It Is Hereby Stipulated and Agreed, by and between the parties hereto, by their respective counsel, that the facts hereinafter stated shall be taken as true, provided, however, that upon the trial of this case either party hereto shall have the right to (a) introduce other and further evidence not inconsistent with the facts herein stipulated; and (b) object to the materiality and relevancy of any fact herein stipulated.

1. Petitioners are and at all times material hereto were husband and wife.

2. At all times pertinent hereto The Progress Company was a partnership composed of petitioner Marc D. Leh and David E. Brown. Petitioner Marc D. Leh was entitled to 50% of the profits and chargeable with 50 per cent of the losses thereof, and his distributive share of the gains and losses of the partnership from sales or exchange of capital assets held for more than six months was 50 per cent.

3. The deficiency whose redetermination is petitioned for herein was determined by the Commissioner in income taxes for the calendar year 1950 in the amount of \$24,669.86, all of which is in dispute. Said deficiency arises out of petitioners' distributive share of said partnership's net income and/or capital gain for the calendar year 1950.

4. The item of "travel and entertainment expenses disallowed" in the amount of \$4,263.48, as

set forth on page 2 of said notice of deficiency, is not disputed by petitioners.

5. The item of capital loss carry-over from 1949, disallowed in the amount of \$2,334.58, as set forth on page 3 of said notice of deficiency, is not disputed by petitioners.

6. Petitioners filed with respondent on March 15, 1954, a claim of refund on Form 843 for the calendar year 1950. A true copy of said claim of refund is attached to the original petition herein, marked Exhibit B. The claim for refund asserts a 1951 net operating loss carry-back to the year 1950 in the amount of \$8,571.44. Respondent concedes that the carry-back is proper.

7. At all times pertinent hereto, General Petroleum Corporation was a Delaware corporation, wholly owned by Socony-Mobil Oil Company, Inc.

8. At all times pertinent hereto, Olympic Refining Company was a Washington corporation, none of whose stock was owned by petitioners or by David E. Brown.

9. At all times pertinent hereto, Olympic-Progress Oil Co. was a California corporation, a majority of whose stock was owned by petitioners and David E. Brown.

10. Joint Exhibit 1-A attached hereto is a true copy of a contract entered into on November 19, 1945, between General Petroleum Corporation and Olympic Refining Company.

11. Joint Exhibit 2-B attached hereto entitled "Distributors' Agreement" is a true copy of a contract entered into between Olympic Refining Com-

pany and The Progress Company on October 20, 1947.

12. Joint Exhibit 3-C attached hereto is a true copy of a letter agreement between Olympic Refining Company and The Progress Company.

13. Joint Exhibit 4-D attached hereto is a true copy of a contract entered into on January 28, 1948, between The Progress Company and Olympic Refining Company. The same is attached as Exhibit C to the amended petition herein.

14. Joint Exhibit 5-E attached hereto is a true copy of a contract entered into on January 28, 1948, between The Progress Company and Olympic Refining Company. The same is attached as Exhibit D to the amended petition herein.

15. Joint Exhibit 6-F attached hereto is a true copy of a letter from The Progress Company to Olympic Refining Company.

16. Joint Exhibit 7-G attached hereto is a true copy of a letter agreement between Olympic Refining Company and The Progress Company.

17. Joint Exhibit 8-H attached hereto entitled "Mutual Termination Agreement" is a true copy of a contract entered into on July 26, 1950, between The Progress Company, Olympic-Progress Oil Co., and Olympic Refining Company.

18. Joint Exhibit 9-I attached hereto is a true copy of a contract entered into between Olympic Refining Company and General Petroleum Corporation on July 31, 1950.

19. Joint Exhibit 10-J attached hereto is a true copy of a contract entered into between Olympic

Refining Company and General Petroleum Corporation on August 1, 1950.

20. Prior to July 26, 1950, that certain contract between The Progres Company and Olympic Refining Company attached hereto as Joint Exhibit 2-B, as amended, was assigned by The Progress Company to Olympic-Progress Oil Company, a corporation.

21. On July 26, 1950, Olympic Refining cancelled an indebtedness of The Progress Company owed to Olympic Refining Company in the amount of \$183,330.50, pursuant to the terms of the Mutual Termination Agreement attached hereto as Joint Exhibit 8-H.

22. That certain contract captioned "Mutual Termination Agreement," Joint Exhibit 8-H herein, was written by one Robert E. Paradise, Esq., as an attorney at law, for Olympic Refining Company.

23. At all times pertinent hereto said Olympic Refining Company has been and now is the client of said Robert E. Paradise, Esq.

24. At the present time said Olympic Refining Company is engaged in litigation as plaintiff and cross-defendant, in opposition to petitioners herein and others as defendants and cross-complainants.

25. Robert E. Paradise, Esq., represents Olympic Refining Company as its attorney in said litigation against petitioners herein.

26. Robert E. Paradise, Esq., has expressed to the attorneys for both petitioners and respondent herein his reluctance to appear as a witness at the

trial hereof because of the facts set out in paragraphs 22, 23, 24 and 25 herein.

27. Joint Exhibit 11-K attached hereto is a true copy of the 1950 income tax return of The Progress Company.

28. Joint Exhibit 12-L attached hereto is a true copy of the 1950 income tax return of Marc D. and L. Waive Leh.

/s/ BARTON B. BEEK,
Counsel for Petitioners.

/s/ JOHN POTTS BARNES, ECC .
Chief Counsel, Internal Revenue Service, Counsel
for Respondent.

[Endorsed]: T.C.U.S. Filed April 9, 1956.

[Title of Tax Court and Docket No. 53879.]

AMENDED PETITION

The above named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency (Ap:LA:AA-CTF 90D:GCE) dated April 23, 1954, and as a basis of their proceeding, allege as follows:

1. Petitioners are individuals with principal office at 620 West Anaheim Street, Long Beach, California. The return for the period herein involved was filed with the Collector for the Sixth District of California.

2. The Notice of Deficiency (a copy of which is attached to the original petition herein and marked

Exhibit A) was mailed to petitioners on April 23, 1954.

3. The deficiency determined by the Commissioner is in income taxes for the calendar year 1950 in the amount of \$24,669.86, all of which is in dispute.

4. The determination of tax set forth in the said Notice of Deficiency is based upon the following errors:

(a) Respondent erroneously determined that the sum of \$183,330.50 paid by Olympie Refining Company to the Progress Company, a partnership in which petitioner David E. Brown held a 50 per cent interest, constituted ordinary income rather than capital gain as reported on petitioners' return.

5. The facts upon which petitioners rely are as follows:

(a) Petitioners are and at all times material hereto were husband and wife.

(b) At all times pertinent hereto the Progress Company was a partnership composed of petitioner David E. Brown and Marc D. Leh. Petitioner David E. Brown was entitled to 50 per cent of the profits and chargeable with 50 per cent of the losses thereof, and his distributive share of the gains and losses of the partnership from sales or exchanges of capital assets held for more than six months was 50 per cent.

(c) On or about July 26, 1950, the Progress Company sold property used in its trade or business. Said property had been held continuously

by the Progress Company for more than six months, to-wit, since January 28, 1948.

(d) Said property consisted of a written contract relating to the purchase of certain quantities of gasoline at specified prices, together with those rights created or transferred thereby.

(e) The terms of said contract were embodied in two letter agreements executed January 28, 1948; copies of said letter agreements are attached to the amended petition of Marc D. Leh in Docket No. 53878 marked Exhibit C and Exhibit D, and are made a part hereof by reference.

(f) The gain realized by the Progress Company from such sale was \$183,330.50.

Wherefore, petitioners pray that this Court hear the proceeding and determine (a) that respondent's determination of the tax is erroneous insofar as the sum of \$183,330.50 paid by Olympic Refining Company to the Progress Company is treated by respondent as ordinary income; (b) that no deficiency exists in petitioners' income tax liability for the taxable year ending December 31, 1950; (c) for such other and further relief as the Court deems just.

Dated: April 13th, 1956.

/s/ DAVID E. BROWN,

In Pro Per.

Duly Verified.

[Endorsed]: T.C.U.S. Filed April 19, 1956.

[Title of Tax Court and Docket No. 53879.]

ANSWER TO AMENDED PETITION

The Commissioner of Internal Revenue, by his attorney, John Potts Barnes, Chief Counsel, Internal Revenue Service, for answer to the amended petition of the above-named taxpayers, admits and denies as follows:

1. Admits that petitioners are individuals and that the return for the period herein involved was filed with the Collector for the Sixth District of California; denies the remaining allegations contained in paragraph 1 of the amended petition.

2. Admits the allegations contained in paragraph 2 of the amended petition.

3. Admits that the Commissioner determined a deficiency in income tax for the calendar year 1950; denies the remaining allegations contained in paragraph 3 of the amended petition.

4. (a) Denies the allegations of error contained in subparagraph (a) of paragraph 4 of the amended petition.

5. (a) and (b) Admits the allegations contained in subparagraphs (a) and (b) of paragraph 5 of the amended petition.

(c) and (d) Denies the allegations contained in subparagraphs (c) and (d) of paragraph 5 of the amended petition.

(e) Denies that the terms of said contract were

embodied in two letter agreements executed January 28, 1948; admits the remaining allegations contained in subparagraph (e) of paragraph 5 of the amended petition.

(f) Denies the allegations contained in subparagraph (f) of paragraph 5 of the amended petition.

6. Denies generally and specifically each and every allegation contained in the amended petition not hereinbefore expressly admitted, qualified, or denied.

Wherefore, it is prayed that the Commissioner's determination be approved.

/s/ JOHN POTTS BARNES,
Chief Counsel, Internal
Revenue Service.

Of Counsel: Melvin L. Sears, Regional Counsel,
E. C. Crouter, Assistant Regional Counsel,
R. E. Maiden, Jr., Special Assistant to the Regional Counsel, George E. Constable, Attorney,
Internal Revenue Service, 1135 Subway Terminal Bldg., 417 South Hill Street, Los Angeles 13, California.

[Endorsed]: T.C.U.S. Filed June 20, 1956.

Tax Court of the United States

27 T. C. No. 10

Marc D. Leh and L. Waive Leh, Petitioners, v.
Commissioner of Internal Revenue, Respondent.

David E. Brown and Christabel H. Brown, Petitioners, v. Commissioner of Internal Revenue, Respondent.

Docket Nos. 53878, 53879. Filed March 11, 1957.

FINDINGS OF FACT AND OPINION

In 1948 a partnership entered into a contract which gave it the right to purchase from a corporation 2,250,000 gallons of gasoline per month. In 1950, when gasoline was in short supply, the corporation paid the partnership the amount of \$183,-330.50 to cancel and terminate the contract. Held, the respondent correctly determined that the gain resulting from this transaction was taxable as ordinary income and not capital gain.

James L. Wood, Esq., and Barton B. Beek, Esq., for the petitioners in Docket No. 53878.

David E. Brown, pro se, in Docket No. 53879.

George E. Constable, Esq., for the respondent.

The respondent determined the following deficiencies in the income tax of petitioners for the year 1940:

	Deficiency
Marc D. Leh and L. Waive Leh	\$24,669.86
David E. Brown and Christabel	
H. Brown	25,377.04

In each of the proceedings the petitioners claim an overpayment of tax.

The sole issue is whether the amount of \$183,330.50 received in 1950 by a partnership from the Olympic Refining Company is taxable as capital gain or ordinary income.

Other issues raised by the pleadings have been settled by stipulations of the parties.

Findings of Fact

Some of the facts have been stipulated and are incorporated herein by this reference.

The petitioners in each proceeding are husband and wife and residents of Los Angeles, California. They filed their income tax returns for the year 1950 with the collector of internal revenue for the sixth district of California. Marc D. Leh and David E. Brown will hereinafter be referred to as the petitioners.

The Progress Company (hereinafter referred to as Progress) was a general partnership. The members of this partnership were Marc D. Leh and David E. Brown and they shared equally its profits and losses.

Progress was formed in 1940 and thereafter engaged in various businesses, particularly businesses

connected with the petroleum industry. Progress engaged in marketing petroleum products during 1947, 1948, 1949 and 1950.

Olympic Refining Company (hereinafter referred to as Olympic) is a corporation engaged in marketing petroleum products.

On November 19, 1945, Olympic entered into a supply contract with General Petroleum Corporation (hereinafter referred to as General) under the terms of which General was obligated to supply Olympic's requirements of gasoline and other petroleum products up to a maximum of 3,500,000 gallons of gasoline each month, and Olympic was obligated to purchase its entire requirements of gasoline from General without restriction as to quantity. The expiration date of the contract was January 1, 1951, but it contained a clause providing for automatic extension from year to year, subject to termination upon six months' notice by either party. This contract will hereinafter be referred to as the General-Olympic contract.

During the years 1946 and 1947 Olympic's purchases from General averaged 1,000,000 to 1,250,000 gallons of gasoline monthly.

On January 28, 1948, Progress entered into a contract with Olympic (hereinafter referred to as the Progress-Olympic contract). This contract was set forth in two letters bearing that date. One letter addressed to Progress by Olympic was as follows:

We are pleased to submit below our proposal to serve you with your requirements of our gasoline.

Your signature of acceptance acknowledges that you have read and are familiar with the terms and conditions of that certain agreement between Olympic Refining Company and the General Petroleum Corporation of California, dated November 19, 1945, and that the terms, amendments, conditions and provisions are incorporated herein by reference and made a part hereof to all intents and purposes as though the same were set forth in full, except that:

1. The quantity of gasoline will be two and one-quarter million gallons, 10% more or less, subject to our option;

2. The prices you will pay us will be one-half cent per gallon greater than the prices which are set forth in said agreement; and,

3. Gasolines purchased hereunder will not be resold for delivery into the States of Washington and Oregon nor within the territory in the State of California which is embraced within exclusive distributor contracts with the Olympic Refining Company as follows: San Francisco, San Jose, Glendale, Pasadena, and San Diego.

The other letter addressed to Olympic by Progress was as follows:

In consideration of the gasoline contract which we have entered into with your company as of this date, it is understood that, in the event the Olympic Refining Company extends and/or makes a contract for gasolines with the General Petroleum Corporation of California and/or any other supplier of petroleum products, The Progress Co.

shall have an extension of its agreement on the same terms and conditions, with the exceptions noted in our agreement of this date.

Likewise, if The Progress Co. should negotiate a contract for gasolines similar to the above referred to type of contract with the General Petroleum Corporation of California and/or any other supplier of petroleum products, The Progress Co. will pay to the Olympic Refining Company one-half ($\frac{1}{2}$ c) cent per gallon during the life of said contract.

Prior to the execution of the Progress-Olympic contract, Progress and Olympic had entered into a "Distributor's Agreement" by the terms of which Progress was entitled to 350,000 gallons of gasoline per month. The "Distributor's Agreement" was assigned by Progress early in 1948 to Olympic-Progress Oil Co., a corporation controlled by petitioners Marc D. Leh and David E. Brown.

Between 1948, when the Progress-Olympic contract was executed, and 1950, the gasoline market expanded, and, by 1950, gasoline was in short supply in the Southern California area. General, as part of its policy of reducing its supply commitments, entered into negotiations with Olympic in 1950 seeking a reduction of its commitment under the General-Olympic contract, and Olympic, in turn, sought reduction or elimination of its commitment under the Progress-Olympic contract.

On July 26, 1950, an agreement, bearing the caption "Mutual Termination Agreement," was entered into by Progress, as First Party, Olympic-Prog-

ress Oil Co., as Second Party, and Olympic, as Third Party. Therein, after referring to prior agreements of the parties, including the Progress-Olympic contract and the "Distributor's Agreement," it was agreed, in part as follows:

1. Each and all of said agreements above described are hereby mutually declared to be cancelled and terminated as of the close of business on the 31st day of July, 1950 and declared to be of no further force or effect.

2. First Party and Second Party hereby release and discharge Third Party and General Petroleum Corporation of and from any and all duties, claims, liabilities or obligations arising out of or in connection with said agreements above described or otherwise.

3. Third Party releases and discharges First Party of and from any and all duties, claims, liabilities or obligations arising out of or in connection with said agreements above described or otherwise; excepting however, that Third Party does not release First Party of or from the following indebtednesses:

(a) The indebtedness in the sum of \$255,277.80 owed by First Party to Third Party as of the close of business on the 24th day of July, 1950, for petroleum products theretofore sold and delivered by Third Party to First Party; and

(b) Any indebtedness of First Party to Third Party for petroleum products sold and delivered by Third Party to First Party up to and including the 31st day of July, 1950, computed at the same

prices used in the computation of said existing indebtedness described in subparagraph (a) above;

First Party agrees to pay said indebtedness or any remaining balance thereof to Third Party on or before the 3rd day of August, 1950.

* * * * *

5. In consideration of the termination of said agreements, as provided in paragraph 1 hereinabove, and in consideration of the releases herein provided for, Third Party shall pay to First Party the sum of \$183,330.50, and to Second Party the sum of \$31,669.50; which said sums may, at the election of Third Party, be paid in cash to Second and Third Parties, respectively, or be paid by crediting the said sums respectively against the respective indebtednesses of First and Second Parties described in paragraphs 3 and 4 hereinabove, which election shall be made by Third Party on or before July 31st.

The amount of \$183,330.50 was paid to Progress during 1950 by crediting this amount to its account with Olympic for gasoline theretofore purchased under the Progress-Olympic contract.

On July 31, 1950, General and Olympic entered into an agreement which provided for the termination of the General-Olympic contract, and on August 1, 1950 they executed a new contract under the terms of which Olympic was entitled to purchase 1,750,000 gallons of gasoline per month. Olympic received from General approximately \$235,000 at the time these agreements were executed.

In the partnership return filed by Progress for

1950, the \$183,330.50 received by it from Olympic was reported as a long-term capital gain and treated as such on the returns filed by petitioners. The respondent determined that this amount constituted ordinary income and that one-half should have been included in the taxable income for 1950 of each petitioner.

Opinion

Raum, Judge: Section 117(j) of the Internal Revenue Code of 1939¹ accords capital gain treat-

¹ Sec. 117. Capital Gains and Losses.

* * * * *

(j) Gains and Losses From Involuntary Conversion and from the Sale or Exchange of Certain Property Used in the Trade or Business.—

(1) Definition of Property Used In the Trade or Business.—For the purposes of this subsection, the term “property used in the trade or business” means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(1), held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or (C) a copyright, a literary, musical, or artistic composition, or similar property, held by a taxpayer described in subsection (a) (1) (C). * * *

(2) General Rule.—If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the

ment to gains from the sale or exchange of certain "property used in the trade or business" of a taxpayer. Petitioners contend that the right to purchase 2,250,000 gallons of gasoline per month, which Progress acquired from Olympic under the Progress-Olympic contract, was "property used in the trade or business" of Progress; that the transaction of July 26, 1950, constituted a "sale or exchange" of this property; and that gain of \$183,330.50 realized was taxable as capital gain and not ordinary income.

We agree with petitioners that the right of Progress to purchase 2,250,000 gallons of gasoline per month which it acquired under the Progress-Olympic contract falls within the definition of "property used in the trade or business" contained in Section 117(j). We do not agree that the transaction of July 26, 1950, constituted a "sale or exchange" of this property right to Olympic.

The petitioners argue that the rights of Progress under the Progress-Olympic contract were essentially the same as the rights of Olympic under the

power of requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. * * *

General-Olympic contract; that the Progress-Olympic contract was, in substance, an assignment from Olympic to Progress of a portion of Olympic's rights under the General-Olympic contract; that the transaction of July 26, 1950 was, in substance, a transfer from Progress to Olympic of the right to purchase 2,250,000 gallons of gasoline per month from General; and that Olympic paid Progress \$183,330.50 for the transfer of this right. We do not agree with this argument, because Progress never acquired the right, by assignment or otherwise, to purchase gasoline from General under the Progress-Olympic contract. That contract gave Progress the right to have its gasoline requirements supplied by Olympic, and the evidence indicates that its purchases were made from Olympic. The General-Olympic contract was a separate and distinct transaction which gave Olympic the right to purchase gasoline from General, and which provided Olympic with a source of supply which enabled it to enter into contracts to sell gasoline to Progress and others. In the circumstances we cannot agree that the substance of the transaction of July 26, 1950, was a transfer from Progress to Olympic of the right of Progress to purchase 2,250,000 gallons of gasoline per month from General.

On July 26, 1950, Progress had the right under the Progress-Olympic contract to purchase 2,250,000 gallons of gasoline per month from Olympic. Because of a shortage in the supply of gasoline at that time, this right had a substantial value. It

was property which was susceptible of transfer for a valuable consideration, and such a transfer would constitute a "sale or exchange." It was also susceptible of being cancelled or terminated for a valuable consideration, in which event one of the essential elements of a "sale or exchange," a transfer of property, would be lacking.

Progress and Olympic were parties to an agreement entered into on July 26, 1950, which was denominated a "Mutual Termination Agreement." After reciting the prior agreements previously entered into by the parties, including the Progress-Olympic contract, this agreement provided in part for the cancellation and termination of the prior agreements, for the release and discharge of Olympic from any duties or obligations arising out of or in connection with the prior agreements, and for the payment of \$183,330.50 by Olympic to Progress in "consideration of the termination of said agreements * * * and in consideration of the releases herein provided for * * *."

The petitioners urge that the fact that the July 26, 1950 agreement was denominated a "Mutual Termination Agreement" and that the words "cancellation" and "termination" were used therein is not necessarily determinative of the nature of the transaction. We agree, and have carefully considered not only the provisions of the agreement but also the attendant facts and circumstances shown by the evidence. They disclose to our satisfaction that the transaction was not intended to effect a sale by Progress of its rights under the

Progress-Olympic contract to Olympic; that Olympic was desirous of cancelling and terminating those rights; and that the amount of \$183,330.50 was paid to Progress in consideration for their cancellation and termination. In return for this payment Progress released Olympic from the obligation to sell it 2,250,000 gallons of gasoline per month. This release not only ended Olympic's duty to supply this gasoline but also destroyed Progress' rights under the Progress-Olympic contract. They were not transferred to Olympic; they "merely came to an end and vanished." Cf. *Commissioner v. Starr Brothers, Inc.*, 204 F. 2d 673, 674 (C.A.2).

We recognize that controversies in this field have resulted in some rather fine distinctions. Thus, the receipt of money in consideration of the relinquishment of contractual rights which had the consequence of enlarging rights in specific property of the other contracting party has been treated as a "sale or exchange." Cf. *Isadore Golonsky*, 16 T.C. 1450, affirmed, 200 F. 2d 72 (C.A. 3), certiorari denied, 345 U.S. 939; *Louis W. Ray*, 18 T.C. 438, affirmed, 210 F. 2d 390 (C.A. 5), certiorari denied, 348 U.S. 829; *McCue Bros. & Drummond, Inc.*, 19 T.C. 667, affirmed, 210 F. 2d 752 (C.A. 2), certiorari denied, 348 U.S. 829; *Henrietta B. Goff*, 20 T.C. 561, affirmed, 212 F. 2d 875 (C.A. 3), certiorari denied, 348 U.S. 829. Judge A. N. Hand undertook in the *McCue Bros. & Drummond* case to distinguish the two lines of cases; in cases such as *Starr Brothers*, *supra*, and *General Artists Corp. v. Commissioner*, 205 F. 2d 360 (C.A. 2),

certiorari denied, 346 U.S. 866, there was a mere release of a contractual right which "vanished," whereas in the other line of cases, "the right of possession under a lease or otherwise, is a more substantial property right which does not lose its existence when transferred." 210 F. 2d at p. 753. And we attempted to apply the principles of these cases in *Pittston Co.*, 26 T.C. 967, where the relinquishment of contractual obligations resulted in enlarged rights in the other party to dispose of specific coal produced at its mines. We felt that the facts there presented were comparable to the ones in the *Golonsky* and *Goff* line of cases. In the instant case, however, we cannot find such a transfer of rights in property as was presented in those cases.

If these distinctions are not wholly satisfying, it should be remembered that the Supreme Court was requested to issue writs of certiorari in a number of these cases in order to clarify the situation, but it refused to do so. In the circumstances, we must do the best we can with the precedents at hand, and, applying those precedents here, we conclude that the cancellation of the contract rights herein did not constitute a "sale or exchange."

Decisions will be entered under Rule 50.

Served and Entered March 12, 1957.

Tax Court of the United States
Washington

Docket No. 53878

MARC D. LEH and L. WAIVE LEH,
Petitioners,
v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Findings of Fact and Opinion filed herein March 11, 1957, directing that decision be entered under Rule 50, the parties, on June 18, 1957, filed an agreed computation for entry of decision. It is therefore

Ordered and Decided: That there is a deficiency in income tax for the year 1950 in the amount of \$20,308.88.

Entered: June 20, 1957.

[Seal] /s/ ARNOLD RAUM,
Judge.

Served and Entered June 21, 1957.

Tax Court of the United States
Washington

Docket No. 53879

DAVID E. BROWN and CHRISTABEL H.
BROWN, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Findings of Fact and Opinion filed herein March 11, 1957, directing that decision be entered under Rule 50, the parties, on June 18, 1957, filed an agreed computation for entry of decision. It is therefore

Ordered and Decided: That there is a deficiency in income tax for the year 1950 in the amount of \$21,403.52.

Entered: June 20, 1957.

[Seal] /s/ ARNOLD RAUM,
Judge.

Served and Entered June 21, 1957.

In The United States Court of Appeals
For The Ninth Circuit

Tax Court Docket No. 53878

MARC D. LEH and L. WAIVE LEH, husband
and wife, Petitioners,

V.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REVIEW

Marc D. Leh and L. Waive Leh, husband and wife, the petitioners in this cause, by James L. Wood and Barton B. Beek, their attorneys, hereby petition the United States Court of Appeals for the Ninth Circuit to review the decision of The Tax Court of the United States entered on June 20, 1957, pursuant to its Findings of Fact and Opinion (24 T.C. No. 110) filed March 11, 1957, determining a deficiency in petitioner's federal income tax for the calendar year 1950 in the amount of \$20,308.88, and respectfully show:

I.

Petitioners, husband and wife, have been since prior to 1950 and are now residents of Los Angeles County, California. Petitioners filed their joint income tax return for the year 1950 with the Collector of Internal Revenue for the Sixth District of California, which collection district is within the jurisdiction of the United States Court of Ap-

peals for the Ninth Circuit, wherein this review is sought. This petition is filed pursuant to Sections 7482 and 7483 of the Internal Revenue Code of 1954.

II.

The nature of the controversy is as follows:

In 1948 a partnership, in which petitioner, Marc D. Leh was one of two equal partners, entered into a contract which gave it the right to purchase from a corporation 2,250,000 gallons of gasoline per month. In 1950, when gasoline was in short supply, the corporation paid the partnership \$183,330.50 to "cancel and terminate" the contract. In the partnership return filed by the partnership for 1950, the \$183,330.50 was reported as a long-term capital gain, and petitioners' distributive share thereof was so treated on their return for 1950. The Commissioner determined that this amount constituted ordinary income and that one-half thereof should have been reported as ordinary income for 1950 by petitioners.

The sole question presented by this appeal is whether the payment received by the partnership upon disposition of its gasoline supply contract was ordinary income or capital gain, when the payment was received from the partnership's supplier and the transaction took the form of a cancellation of the supply contract by the supplier and the partnership.

Wherefore, petitioners pray that the United States Court of Appeals for the Ninth Circuit review the Findings of Fact and Opinion herein-

above referred to, and the decision entered pursuant thereto, and reverse the determination there made.

/s/ JAMES L. WOOD,
Counsel for Petitioners.

Duly Verified.

[Endorsed]: T.C.U.S. Filed Sept. 16, 1957.

In the United States Court of Appeals
for the Ninth Circuit

Tax Court Docket No. 53879

DAVID E. BROWN and CHRISTOBEL H.
BROWN, husband and wife, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REVIEW

David E. Brown and Christobel H. Brown, husband and wife, the petitioners in this cause, by James L. Wood and Barton B. Beek, their attorneys, hereby petition the United States Court of Appeals for the Ninth Circuit to review the decision of The Tax Court of the United States entered on June 20, 1957, pursuant to its Findings of Fact and Opinion (24 T.C. No. 110) filed March 11, 1957, determining a deficiency in petitioner's federal in-

come tax for the calendar year 1950 in the amount of \$21,403.52, and respectfully show:

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II.

The nature of the controversy is as follows:

In 1948 a partnership, in which petitioner, David E. Brown was one of two equal partners, entered into a contract which gave it the right to purchase from a corporation 2,250,000 gallons of gasoline per month. In 1950, when gasoline was in short supply, the corporation paid the partnership \$183,330.50 to "cancel and terminate" the contract. In the partnership return filed by the partnership for 1950, the \$183,330.50 was reported as a long-term capital gain, and petitioners' distributive share thereof was so treated on their return for 1950. The Commissioner determined that this amount constituted ordinary income and that one-half thereof should have been reported as ordinary income for 1950 by petitioners.

The sole question presented by this appeal is whether the payment received by the partnership upon disposition of its gasoline supply contract was ordinary income or capital gain, when the payment was received from the partnership's supplier and the transaction took the form of a cancellation of the supply contract by the supplier and the partnership.

Wherefore, petitioners pray that the United States Court of Appeals for the Ninth Circuit review the Findings of Fact and Opinion hereinabove referred to, and the decision entered pursuant thereto, and reverse the determination there made.

/s/ JAMES L. WOOD,
Counsel for Petitioners.

Duly Verified.

[Endorsed]: T.C.U.S. Filed Sept. 16, 1957.

The Tax Court of the United States

Docket Nos. 53878 - 53879

MARC D. LEH and L. WAIVE LEH, DAVID
E. BROWN and CHRISTABEL H. BROWN,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

TRANSCRIPT OF PROCEEDINGS

Court Room No. 9, United States Post Office and

Court House Building, Los Angeles, California.
April 9, 1956—3:30 p.m.

(Met pursuant to notice.)

Before: Honorable Arnold Raum, Judge.

Appearances: Barton B. Beek and James L. Wood, 433 South Spring Street, Los Angeles, California, appearing for Petitioners Marc D. Leh and L. Waive Leh. David E. Brown, 250 Hillside Road, South Pasadena, California, appearing Per Se. George Constable, Office of Commissioner of Internal Revenue, 1135 Subway Terminal Building, Los Angeles, California, appearing for the Respondent. [1]*

* * * * *

Mr. Beek: We will call Mr. Leh.

Whereupon,

MARC D. LEH

called as a witness for and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name and address for the record?

The Witness: Marc D. Leh, 570 Garden Lane, Pasadena, California.

Direct Examination

Q. (By Mr. Beek): You are the petitioner, Mr. Leh? A. Yes.

Q. One of the petitioners, and L. Waive Leh, your co-petitioner, is your wife? [21]

* Page numbers appearing at top of page of Reporter's Transcript of Record.

(Testimony of Marc D. Leh.)

A. Yes.

Q. Can you tell us, Mr. Leh, how long you have been associated with the gasoline business?

A. Since 1924.

Q. In what capacities?

A. Principally in the marketing of petroleum products.

Q. By whom were you employed in 1924?

A. General Petroleum Corporation of California.

Q. How long did that employment continue?

A. Until 1938.

Q. At what time, Mr. Leh, was your partnership with Mr. Brown formed?

A. Early part of 1940.

Q. In between 1938 and 1940, were you associated with the gasoline marketing business, Mr. Leh?

A. Indirectly.

Q. What was your occupation at that time?

A. I was connected with the development of barging of petroleum products up the Columbia River in Oregon for the Tidewater Transportation Company.

Q. After you and Mr. Brown formed The Progress Company, what business did that partnership engage in?

A. It went into various businesses, principally petroleum.

Q. The name of your partnership with Mr. Brown was [22] what, Mr. Leh?

A. The Progress Company.

(Testimony of Marc D. Leh.)

Q. Thank you. When you say that the business of The Progress Company was petroleum, would you describe for us what part of the petroleum business The Progress Company was active in?

A. Principally marketing and affiliated businesses such as petroleum drums, steel drums, and other products connected directly or indirectly with the petroleum industry.

Q. Did The Progress Company engage in retail sales of gasoline?

A. The sales of gasoline to retailers, yes.

Q. I show you now, Mr. Leh, Joint Exhibit 1-A, and ask you whether, prior to January 1948, you were familiar in a general way with that document.

A. Before what date?

Q. Before January 1948, that is, in 1947.

A. Yes, in substance.

Q. What is that document, Mr. Leh? Just describe it in general terms.

A. This is a supply contract between General Petroleum Corporation of California and the Olympic Refining Company, Long Beach, California.

Q. With reference to that contract, Mr. Leh, did you at any time enter into a contract with the Olympic Refining [23] Company?

A. Yes.

Q. I show you now Joint Exhibits 4-D and 5-E, and ask you whether those are the contracts to which you refer.

A. Yes.

Q. For the sake of convenience, Mr. Leh, I will refer to Joint Exhibits 4-D and 5-E as the letter agreements. Those letter agreements constituted

(Testimony of Marc D. Leh.)

gasoline supply contracts between The Progress Company and Olympic Refining Company, did they not? A. They did.

Q. Can you describe briefly the negotiations and the business situation which led to the formation of those contracts?

A. The business negotiations leading to and resulting in the acceptance of these agreements were the result of attempting to write a price clause as appeared from the General Petroleum contract with Olympic, and in order to simplify the matter, we accepted an assignment of part of General Petroleum's supply contract with the Olympic Refining, as stated in 4-D, Exhibit 4-D.

Q. Then prior to January 1948, you were aware that Olympic Refining Company was entitled to take large quantities of gasoline from General Petroleum? A. Yes, sir.

Q. Did you know what quantity Olympic was entitled to take, approximately? [24]

A. Yes.

Q. What was that quantity?

A. Some three and a half million gallons per month.

Q. Did you know whether or not Olympic Refining Company was able to sell all that quantity of gasoline each month?

A. Only by their statement that they were not.

Q. Did you and your partner, Mr. Brown, feel that you could sell that gasoline? A. Yes.

(Testimony of Marc D. Leh.)

Q. What quantity of gasoline was covered by the agreement of January 1948, Mr. Leh?

A. The agreement of January 28, 1948, marked 4-D, specified a quantity of two and one quarter million gallons per month, ten percent, more or less, subject to the option of the Olympic Refining Company.

Q. Those contracts, which we call the letter agreements, the 4-D and 5-E, were held by The Progress Company, a partnership, during their entire life, were they not? A. Yes.

Q. Were they ever assigned by you?

A. Yes, they were held.

Q. They were held by The Progress Company?

A. They were held—would you repeat that question, please? I am confused. [25]

Q. I will rephrase the question. Did The Progress Company ever assign its rights under the letter agreements prior to July of 1950? A. No.

Q. Thank you. I show you now, Mr. Leh, Joint Exhibit 2-B, and ask you to describe—are you familiar with that document, Mr. Leh?

A. Yes.

Q. Will you describe it in general terms?

A. This Exhibit 2-B is entitled "Distributor's Agreement, the Sales Agreement Between Olympic Refining Company and David E. Brown and Marc D. Leh, doing business as The Progress Company."

Q. And the date of that agreement is—

A. October the 20th, 1947, for an area roughly known as the Pasadena area, and the quantity was,

(Testimony of Marc D. Leh.)

I believe—not “believe”—was 350,000 gallons per month.

Q. Thank you. That distributor agreement was in force at the time the letter agreements, Joint Exhibits 4-D and 5-E were entered into?

A. Yes.

Q. I show you now Joint Exhibit 3-C, and ask you if you are familiar with that document.

A. I am.

Q. What was its nature, Mr. Leh? [26]

A. This was an amendment to the distributor's agreement dated October 20, 1947, wherein the quantity and area was increased.

Q. Directing your attention particularly to the third paragraph of this agreement containing the expression, “The territory outlined in Exhibit A attached hereto,” do you recall what “Exhibit A attached hereto” referred to, Mr. Leh?

A. Yes.

Q. What was that?

A. It is my recollection that it referred to an area in Southern California south of the Tehachapi Mountains at the Mexican Border and to the Arizona Border.

Q. Was Exhibit A attached?

A. I believe it was.

Q. Thank you. I show you now Joint Exhibit 6-F, and ask you if you are familiar with that document.

A. Yes, I am.

Q. What is its general nature, Mr. Leh?

(Testimony of Marc D. Leh.)

A. It is a cancellation of the amendment I filed as 3-C.

Q. The one we have just discussed?

A. Yes.

Q. Thank you. I show you now Joint Exhibit 7-G, and ask you if you are familiar with that document.

A. Yes. [27]

Q. And its general nature was——

A. It was an amendment to the distributor's agreement of October 20, 1947, and the date of this amendment is February the 13th, 1948.

Q. Thank you. Now, Mr. Leh, taking together Joint Exhibit 2-B and Joint Exhibits 3-C, 6-F and 7-G, is it correct to state that those four exhibits taken together constitute one contract with its amendments?

A. Yes.

Q. Thank you. Did The Progress Company continue to hold the distributorship agreement, Joint Exhibit 2-B, as amended by the letter agreements that we have been discussing?

A. No.

Q. Did The Progress Company assign that agreement as amended to another entity?

A. Yes.

Q. What was that other entity, Mr. Leh?

A. The Olympic Progress Oil Company.

Q. Do you know who were the principal stockholders of the Olympic Progress Oil Company?

A. Yes.

Q. Will you tell us who they were?

A. It is my recollection that Mr. David E.

(Testimony of Marc D. Leh.)

Brown, Mr. Arthur, Mr. Lee Orr, Mr. Harry Rogers and Marc D. Leh.

Q. Would it be correct to say that you and Mr. Brown [28] controlled Olympic Progress Oil Company?

A. What do you mean by "controlled"?

Q. Would it be correct to say that the management of Olympic Progress Oil Company was under your supervision? A. Yes.

Q. Thank you. To recapitulate, Mr. Leh, subsequent to the assignment of this distributor agreement, Joint Exhibit 2-B, to the Olympic Progress Oil Company, The Progress Company had no further interest in the distributor's agreement, is that correct?

A. Subsequent to the assignment?

Q. The assignment.

A. No. That is correct, that's correct.

The Court: When was that assignment made?

Mr. Beek: Beg your pardon, your Honor.

The Witness: It was made sometime, in my recollection, the early part of 1948.

Q. (By Mr. Beek): Do you recall the exact date of the assignment, Mr. Leh?

A. No, I do not. My recollection is that Olympic Progress Oil Company was incorporated in 1947, and shortly thereafter, this distributor's agreement to The Progress Company was assigned to the Olympic Progress Oil Company.

Q. Now, at the time of that assignment, Mr. Leh, [29] was there any assignment of the letter

(Testimony of Marc D. Leh.)

agreements, which are Joint Exhibits 4-D and 5-E?

A. No.

The Court: Did the assignment occur prior to the receipt of Exhibits 4-D and 5-E?

The Witness: My recollection is that it was—or was concurrent with the letter of January 28th, where the first reference on the Olympic Refining Company, dated February 13th, 1948—

The Court: That is in Exhibit 7-G?

The Witness: Exhibit 7-G amends the price clause of Exhibit 2-B, and it refers to this letter of January the 28th, 1948. I am not positive—

Mr. Beek: I think we will clarify this in a moment, your Honor.

Q. (By Mr. Beek): Then may I ask you: There were two separate contracts, one we called the distributor's agreement, which was assigned to Olympic Progress Oil Company, a corporation; the other was the supply contract created by the letter agreements 4-D and 5-E, and that was held by The Progress Company, the partnership, is that correct, Mr. Leh? A. That is correct.

Q. Referring now to the contracts which are embodied in the letter agreements, Joint Exhibits 4-D and 5-E, what [30] was the quantity of gasoline which The Progress Company was entitled to purchase under those contracts?

A. Two and one quarter million gallons, ten percent more or less.

Q. Was that full amount purchased in each

(Testimony of Marc D. Leh.)

month subsequent to the execution of those contracts?

A. It increased progressively to the full quantity.

Q. During the first month, then, two and a quarter million gallons was not purchased, is that correct?

A. No. A very little amount, if any.

Q. In the early part of 1950, how much gasoline was purchased under that contract?

A. It is my recollection that we were taking the maximum allowed us by the Olympic Refining Company, which would be two million, twenty-five thousand gallons per month.

Q. You say that in 1950, the full amount was taken under these letter agreements. Was the full amount taken right up to the time of the so-called mutual termination agreement in July of 1950?

A. It is my recollection that up to the time that we sold our supply contract, we were taking the full amount under this contract. Now, if I may comment: The letter agreement refers to two and one quarter million gallons, ten percent more or less. That was reduced to the minimum by Olympic Refining Company, so we were taking the amount allowed [31] by them of two million twenty-five thousand gallons per month.

Q. Thank you. Can you describe now, Mr. Leh, in general terms, the negotiations which led up to what you have termed the sale of your supply contract?

(Testimony of Marc D. Leh.)

A. It is my recollection that either late 1949 or early 1950, Olympic Refining Company informed me that their supplier, the General Petroleum Corporation, due to demands for the South Pacific, needed more gasoline, and they were confronted with either enlarging their refinery or going into the open market to purchase gasoline, therefore, they were reviewing all of their supply contracts, of which the Olympic Refining contract was one, and came to us to ask if we were interested in selling our supply contract. Subsequent to that, why, negotiations were started, and ended in a sale sometime in July 1950.

Q. I show you now, Mr. Leh, Joint Exhibit 8-H, entitled "Mutual Termination Agreement," and ask you whether you are familiar with that document.

A. I am.

Q. Is that the document by which the sale of your supply contract was consummated?

A. It is.

Q. Do you know, Mr. Leh, who wrote that document?

A. I was informed by Mr. Paradise that he had written it. [32]

Q. Did you submit at any time to Olympic Refining Company, or to Mr. Paradise, a draft of this document?

A. A draft of this Exhibit 8-H?

Q. That's right. A. No, sir.

Q. The language of this document, then, was not suggested by you, was it? A. No, sir.

(Testimony of Marc D. Leh.)

Q. I will ask you now to turn to Page 3 of Joint Exhibit 8-H, and to Paragraph 5 appearing on Page 3, reading as follows:

“In consideration of the termination of said agreements as provided in Paragraph 1 herein above, and in consideration of the releases herein provided for, third party shall pay to first party the sum of \$183,330.50, and to second party, the sum of \$31,669.50.”

I will ask you, Mr. Leh, first of all, who was the third party? I will suggest you refer to Page 1.

A. The third party—Olympic Refining Company was the third party.

Q. And the first party was The Progress Company, a partnership, is that correct?

A. The Progress Company, and the second party was Olympic Progress Oil Company. [33]

Q. Can you tell us, Mr. Leh—can you tell us, first, what was the total consideration paid by third party? A. \$215,000.

Q. Thank you. And that was divided into the sums of \$183,330.50 and the other sum of \$31,669.50. How was that division determined, Mr. Leh?

A. In direct ratio of the gasoline supplied to the two entities from Olympic Refining Company.

Q. The first party, The Progress Company, received \$183,330.50, is that correct?

A. That is correct.

Q. And they were entitled to receive how much gasoline?

A. They were entitled to receive two million

(Testimony of Marc D. Leh.)

two hundred fifty thousand gallons, ten percent more or less at the option of the Olympic Refining.

Q. Thank you. The sum of \$31,669.50 was paid to Olympic Progress Oil Company, is that correct?

A. That is correct.

Q. How much gasoline was Olympic Progress Oil Company entitled to take?

A. Three hundred fifty thousand gallons per month.

Q. Thank you. Referring now, Mr. Leh, to the total consideration of \$215,000, which passed subject to this mutual termination agreement, Joint Exhibit 8-H, was that consideration bargained for by you and Mr. Brown as a single [34] sum?

A. I bargained for it, yes.

Q. Can you tell us how that figure of \$215,000 was arrived at?

A. It was over a period of several months. My first asking price for the partnership—my recollection was that it was in the neighborhood of \$600,000, and over a period of time, why, we negotiated and came to a figure, I believe—a grand total figure of \$275,000, and at the request of the Olympic Refining Company, gave them an option for \$275,000, and then at a later time, on or about July 25th, we agreed that a purchase price of \$215,000 for the distributor's agreement and our supply—the assignment of our supply contract, of this supply contract, would be the sum.

Q. Thank you. It would be correct, then, to say that the figure of \$215,000 was reached as a result

(Testimony of Marc D. Leh.)

of bargaining back and forth between the parties; is that a true or correct statement?

A. That is true, and it took time, for I was informed that negotiations were being carried on with General Petroleum Corporation by Olympic at the same time that they were negotiating with us.

Q. What were you advised as to the nature of those negotiations, Mr. Leh?

A. I stated earlier that with the demand of petroleum [35] products in the South Pacific, General Petroleum Corporation needed more gasoline and was trying to either obtain it by purchase of supply contracts, or any source available, or enlarge their refinery, and that is what prompted Olympic Refining Company to negotiate it with us.

The Court: Did Olympic do any refining?

The Witness: They had a refinery, your Honor, but at that time, I do not believe it was operating.

The Court: So that it was merely a middleman as between your organization and General Petroleum?

The Witness: Yes, sir.

Q. (By Mr. Beek): Did you, when you negotiated this figure of \$215,000, know what your profits had been for the prior year of operation?

A. No, not exactly. I knew we were making money, but I didn't know the exact amount, don't know at this moment.

Q. Did you then know or have any exact way of estimating what your profits would be for the following year of operation? A. No.

(Testimony of Marc D. Leh.)

Q. Did you, in negotiating the figure of \$215,000, make any attempt to determine what profit you would make if you did not sell this supply contract?

A. I didn't hear the start of that question. [36]

Q. Perhaps I should rephrase it. Did you, while negotiating this figure of \$215,000, attempt to determine what your profits would be if you did not sell the supply contract?

A. No, because there's no guaranteed profits in the contract.

Q. Did you at that time know how long your supply contract would run?

A. In my opinion, as a layman, the termination of that agreement was rather vague, the General Petroleum agreement. We had reason to suspect that it could run until 1951 or 1952, depending on how you interpreted the cancellation clause from General Petroleum to the Olympic Refining Company.

Q. You referred to the cancellation clause from General Petroleum to Olympic Refining Company. Are you referring to a clause in Joint Exhibit 1-A?

A. I am referring to a cancellation clause in 1-A, of which we took 4-D and make it a part of this agreement.

Q. Was it your understanding that under your supply contract you would be entitled to continue taking gasoline from Olympic Refining Company in the event that Olympic Refining Company secured a new contract with General Petroleum?

A. Yes.

(Testimony of Marc D. Leh.)

Q. The life of your agreement, then, depended on several variables, did it not? A. Yes. [37]

Q. What market factors influenced the profits that you would make under that supply contract, Mr. Leh?

A. What market factors influenced the profits?

Q. That's right.

A. Well, the shorter the supply position of gasoline, the more profits would be made.

Q. Is the supply position of gasoline readily predictable for more than, say, two months in advance?

A. Oh, you might forecast it as much as six months, two, three, four, five, six months.

Q. At the most, then, you would not be able to estimate your profits from such a supply contract for more than six months?

Mr. Constable: I am going to object to leading the witness.

The Court: I think the last question or two were unduly leading.

Q. (By Mr. Beek): Subsequent to July 26, 1950, which is the date of Joint Exhibit 8-H, did The Progress Company continue in the gasoline business, Mr. Leh?

A. No. We terminated our wholesale gasoline business with the sale of our supply contract to the Olympic Refining Company.

Q. Can you tell me briefly why you didn't continue [38] the gasoline business?

A. We no longer had a supply of gasoline.

(Testimony of Marc D. Leh.)

Q. Mr. Leh, I'd like you to look again at Joint Exhibit 8-H, the mutual termination agreement. Turning to Page 2 in the third paragraph headed "Whereas," reference is made to certain claims and demands against Olympic Refining Company and/or General Petroleum Corporation.

These claims and demands, Mr. Leh, can you tell us in general terms what this language refers to?

A. Generally, you have to interpret it in the light of conditions existing as of that time, which was in 1949 and 1950, and with the ambiguous price clause in the General Petroleum-Olympic Refining contract, you constantly have conflict for a better price the moment you start doing business with an oil company, and the buyer is trying to reduce the price and the seller is trying to increase it, and the conflict, I think, continues on.

I don't recall—I noticed here for the first time that General Petroleum Corporation is named in here—I don't know that I ever talked to General Petroleum Corporation as to a better price.

Q. Now, the third paragraph below the paragraph we just discussed, Mr. Leh, says that:

"First and second party hereby release and discharge third party and General Petroleum [39] Corporation of and from all duties, claims, liabilities or obligations."

The word "claims," in that paragraph, Mr. Leh, does that have any particular meaning to you?

A. I don't know. I don't know what the word—

(Testimony of Marc D. Leh.)

I think I know what the word "claims" means to me. We had a beef about the prices.

Q. Mr. Leh, was any part of the consideration of \$215,000 which you and your partner and your corporation received under this agreement, paid for these claims and demands?

A. Not to my knowledge.

Q. Did you at the time this contract was executed have an opinion as to the value, if any, of such claims and demands?

A. I had no value nor an opinion.

Mr. Beek: Mr. Clerk, I will now hand you a carbon copy, what purports to be a carbon copy of a letter, and ask that it be marked.

The Clerk: 16 for identification.

(The document above referred to was marked
Petitioners' Exhibit No. 16 for identification.)

Q. (By Mr. Beek): Mr. Leh, I now show you what purports to be a carbon copy of a letter, and ask you if you have even seen [40] such a letter.

A. Yes.

Q. Can you describe it, please?

A. It is a letter that I wrote as a partner of The Progress Company to the Olympic Refining Company, June 26, 1950, and which, in compliance with Olympic Refining Company's request, I have granted them an option with which to purchase our supply contract and terminate our business relations. This obligation was for a sum—in two sums: \$250,000 under one condition, and \$275,000 on another condition, the option to expire July 7, 1950.

(Testimony of Marc D. Leh.)

Q. You say, Mr. Leh, that you wrote that letter. By that, do you mean that you dictated the letter?

A. Yes, sir.

Q. Did you see the original of that letter, Mr. Leh, after you had dictated it?

A. Yes. I believe I signed it.

Q. And after you signed it, what did you do with it, Mr. Leh?

A. It was either mailed or delivered direct to the Olympic Refining Company.

Mr. Beek: The Petitioners will offer 16 for identification into evidence.

Mr. Constable: No objection.

The Court: Admitted. [41]

(The document heretofore marked Petitioners' Exhibit No. 16 was received in evidence.)

Q. (By Mr. Beek): Referring again to Petitioners' Exhibit 16 in evidence, I call your attention now to the last paragraph in that letter and ask you to read it, Mr. Leh.

A. "The above options do not state the measure of damages which we have suffered as a result of your overcharging us since January 1950. However, should you accept either of the options above, we will give you formal releases in accordance with the option you have accepted."

Q. Thank you. This paragraph contains the expression "overcharging us." What did you mean, Mr. Leh, by that expression when you wrote the letter?

A. I believe I testified two or three times here

(Testimony of Marc D. Leh.)

already about the arguments existing of the seller and buyer on prices of gasoline, continuing beefs—a slang phrase.

Q. And this expression, then, and in fact, this paragraph refers to those disagreements to which you have testified, is that correct?

A. Yes.

The Court: Was that based on the theory that you were being charged a greater differential than the half cent, or was it based upon the base price?

The Witness: No. I do not believe on the half a [42] cent, but we were fluctuating in price wars up and down. The market was fluctuating, and it was difficult to obtain just where you stood under the formula of the General Petroleum contract to the Olympic Refining under that clause, and possibly with Olympic Refining, there were arguments as to what we should be charged.

Q. (By Mr. Beek): I notice, Mr. Leh, that this letter bears the date just one month prior to the execution of Joint Exhibit 8-H, the mutual termination agreement. Would you say, Mr. Leh, that this letter was written early in your negotiations?

A. Oh, no. Negotiations were coming pretty well to an understanding on this date.

Q. Mr. Leh, at the time the mutual termination agreement, Joint Exhibit 8-H, was entered into, and prior thereto during the negotiations to which we have testified, were you aware of any negotiations conducted between Olympic Refining Company and General Petroleum Corporation?

(Testimony of Marc D. Leh.)

A. Yes, by utterances from officers of the Olympic Refining Company.

Q. Were those utterances made a part of your negotiations with Olympic Refining Company?

A. Yes.

Q. What was your understanding at that time of the negotiations between Olympic Refining Company and General [43] Petroleum Corporation?

A. That General Petroleum Corporation was obtaining this supply contract, and, therefore, were paying for it.

Q. Do you know, Mr. Leh, what, if any, change in the contractual relations between the Olympic Refining Company and General Petroleum Corporation took place at or about the time of the execution of your mutual termination agreement?

A. I was informed by the Olympic Refining Company that their contract with General Petroleum had been reduced in an amount equal to or approximately equal to the amount we had sold.

Q. Did they inform you whether or not any cash consideration passed in that transaction?

A. Yes.

Q. How much and to whom?

A. They didn't tell me at that time.

Q. You testified a few moments ago that when you first began negotiating for the sale of your supply contract, you started out at a figure of \$600,000. How did you arrive at that figure, Mr. Leh?

A. Well, frankly, it sounds odd coming back to

(Testimony of Marc D. Leh.)

two hundred fifteen, but that seemed like a pretty fair price for it. Talking to the industry, and the tightness of the market, and the situation, world affairs, economy, the demand for gasoline, it looked as if we had a supply position that was [44] rather valuable.

Q. Then the final figure of \$215,000 represented as far down as you would go, is that correct?

A. That's right.

Q. How did you arrive at the figure of \$275,000, which is referred to in the letter of June 26, 1950, Petitioners' Exhibit 16?

A. After negotiations had proceeded for a while, Olympic Refining Company was desirous of us giving them some sort of a tangible option with which to negotiate with General Petroleum, and we had at that time on June 26th reached the level of \$275,000, and that is the basis for which the option was granted to them.

Mr. Beck: I believe that is all.

The Court: We will reconvene tomorrow morning at 10:00 o'clock.

(Whereupon, at 5:00 o'clock, p.m., an adjournment was taken until 10:00 o'clock a.m., April 10, 1956.) [45]

Proceedings

Whereupon,

MARC D. LEH

called as a witness for and on behalf of the Petitioners, having been previously duly sworn, resumed the stand and testified further as follows:

Cross Examination

Q. (By Mr. Constable): Mr. Leh, will you describe what the operations of The Progress Company consisted of in 1950?

A. It was a co-partnership, and in the early part of 1950, we were in the marketing of gasoline. We had holdings as individuals, and, I believe, as a partnership, holdings in a ranch operation, and I believe we were in—possibly in the process of manufacturing batteries.

Q. Pardon me?

A. Batteries, electrical batteries.

Q. Will you describe your operations in connection with petroleum products, how your operations were carried out?

A. We had a supply contract from Olympic Refining Company, and sold gasoline to buyers of gasoline.

Q. Did you have any equipment that you used in connection with the sale of this gasoline?

A. You mean like adding machines or——

Q. I am referring to trucks or storage facilities.

A. No, sir.

Q. Was your function more or less that of a broker?

A. No, sir.

(Testimony of Marc D. Leh.)

Q. Were the products taken directly from Olympic Refining Company and then delivered to your retailers?

A. We took the product from Olympic Refinery and delivered it to the retailers or wholesalers.

Q. How were the deliveries made, Mr. Leh, if you had no equipment?

A. By truck and trailers, common carriers, and some were sold F.O.B. the rack, Olympic rack, loading rack.

Q. Well, then, The Progress Company had no facilities, no equipment other than office furniture and fixtures, which was used in connection with the contracts in question, is that correct?

A. No, it is not correct, because we had under hire trucks and delivery equipment.

Q. Did you rent these trucks?

A. On each individual trip, yes, on some of our sales.

Q. The rental was made, then, just for each delivery, is that correct?

A. The same—I may just illustrate this way: That if I had 10,000 gallons of gasoline to haul from X to Y, I would call up a freight line and retain that freight line to pick up my commodity at X and haul it to Y. [49]

Q. You paid them on a standard rate basis for carrying per gallon?

A. Regular commission rate. And then some was sold F.O.B. the loading rack at the Olympic Refining Plant.

(Testimony of Marc D. Leh.)

You see, it is customary, I mean in that type of no brand or rebrand business, that some of the dealers have their own trucks, and to minimize their delivery costs and operations, they come and get their own gasoline for their stations, so the title of the gasoline can pass at the Olympic Refining rack.

Q. Did you have a regularly designated group of accounts that you sold to, or did you sell to anyone who would buy?

A. Sell to anybody that would buy.

Q. Will you describe the operation of Olympic Progress Oil Company? As I understand, that is the corporation?

A. It was similar, in my recollection, to the operation of The Progress Company.

Q. Was it different in any respect?

A. It operated under a different agreement with amendments — no — I would say that it operated identically the same. When I say operating, I am referring to the sales method—that is the line of your questioning—I am not commenting as to the contractual relations between Olympic Progress Oil Company and Olympic Refining Company. [50]

Q. Mr. Leh, do you recall on July 14, 1954, that you signed a sworn statement which was filed with this court in the form of a petition wherein you recited certain facts to be true in connection with this case?

A. I remember signing—for Mr. Vander Horst, do you mean?

(Testimony of Marc D. Leh.)

Mr. Constable: Your Honor, may I use the original petition which was filed?

Q. (By Mr. Constable): Mr. Leh, I refer you now to the original petition which was filed in Docket 53878, and which bears, I believe, your signature on Page 5. Do you recall signing that document? A. I do.

Q. Were you familiar with the facts that are recited therein beginning at Paragraph 5 on Page 2? A. Yes.

Q. Do the facts as recited in that petition state that the mutual termination agreement known as Exhibit 8 purported to cancel, as far as The Progress Company was concerned, the agreement shown as Exhibit 1-A?

A. Yes, that is correct.

Mr. Beek: Just a moment. Your Honor, I would like to ask Mr. Constable: Did you intend to refer to Exhibit 1-A, Mr. Constable? That is a contract to which Mr. Leh and Mr. Brown were not parties. [51]

Mr. Constable: Well, I will withdraw that question, your Honor.

Q. (By Mr. Constable): It is true, isn't it, Mr. Leh, that the facts recited in the petition state that the mutual termination agreement shown as Exhibit 8 purports to cancel any rights that the Progress Company had under the agreements known as Exhibit 3-C and 4-D—correction—4-D and 5-E?

A. That stated that it cancelled Exhibit 1 and 4-D?

(Testimony of Marc D. Leh.)

Q. Well, let me refresh you, Mr. Leh——

A. I am frankly a little confused.

Q. I think your testimony yesterday was to the effect that in November 19, 1945, you were familiar—strike that.

Your testimony yesterday was to the effect that you were familiar with an agreement of November 19, 1945, shown as Exhibit 1, between General Petroleum and Olympic Refining, is that correct?

A. That is correct.

Q. And that is known as Exhibit 1?

A. That is right.

Q. You also testified that you were familiar with a distributor's contract known as Exhibit 2-B, dated October 20, 1947?

A. That's correct.

Q. I think your testimony was to the effect that [52] Exhibit 1-A was ultimately—correction—that the distributor's contract between Olympic Refining, known as Exhibit 2-B—between Olympic Refining and The Progress Company was assigned by The Progress Company to Olympic Progress Company, the corporation?

A. The Olympic Progress Oil Company, yes.

Q. Now, is it not true that the facts stated in your petition recite that the \$183,000 payment in question was made to The Progress Company for the cancellation of The Progress Company's rights under Exhibit 2-B?

A. No. I don't see that.

(Testimony of Marc D. Leh.)

The Court: That is apparently what it states. The question is whether it states it accurately.

Mr. Beek: We are willing to stipulate that that is what it states.

The Court: It doesn't use the symbols 2-B, but it refers to the distributor's agreement.

The Witness: And it is dated October 20, 1947.

Mr. Constable: That's correct.

The Witness: And I signed this agreement on this petition prepared by our certified public accountant, Mr. Vander Horst, at that time, who was handling our cash matters.

Mr. Constable: That is correct.

Q. (By Mr. Constable): You are familiar, are you not, with the amended [53] petition that was filed with the Court yesterday?

A. Are you referring to that stipulation, you mean?

Q. Referring to the amended petition in the case of Docket 53878, and particularly to the facts beginning in Paragraph 5 on Page 2, and to your signature on Page 5. A. Yes.

Q. Referring to those two petitions, Mr. Leh, are the facts in them inconsistently stated?

A. Yes, I would say it were. They are inconsistent.

Q. Both of the facts were sworn to by you, is that correct? A. That is correct.

Q. Which of the facts — which of your sworn statements is true, Mr. Leh?

A. The only statement that is true is the one

(Testimony of Marc D. Leh.)

that is supported by the factual evidence of the contracts themselves. I didn't prepare either document.

Q. Did you read the documents before you signed them?

A. Yes, sir. I read them in 1954, and, to the best of my belief, that was a statement that was true.

Q. What caused you to change your belief in the facts between 1954 and yesterday?

A. First, in Mr. Vander Horst's preparation of our tax matter, prepared the original petition which I signed. Upon examination of the factual transfers and the dates and [54] the documents involved, it caused us to alter our petition.

Q. When you signed the original petition, were you aware of all the exhibits which are now in evidence? A. I believe I was.

Q. At what date did you finally believe that the rights which were cancelled by Exhibit 8 arose under Exhibits 4-D and 5-E?

A. What was that question again, please?

Q. Now, as I understand it, the facts stated in your amended petition are that any rights which The Progress Company had which were cancelled by the mutual termination agreement were those rights existent under Exhibits 4-D and 5-E. Is that correct? A. That is right.

Q. And you have so stated in your amended petition? A. That is correct.

Q. At what date did you form your belief of the facts stated in your amended petition?

(Testimony of Marc D. Leh.)

A. I think I have always had that same belief. I have never changed my belief. The petition was improperly drawn in the first instance in 1954. It did not support the factual conditions.

Q. Did you know that it was improperly drawn?

A. No, I did not at the time.

Q. And yet you read the facts alleged in the petition? [55]

A. Yes. I read the facts, and there was a reference there to \$183,000, which was in accordance with The Progress Company's settlement of the sale from Olympic Refining Company.

Mr. Constable: Will you mark this?

The Clerk: Exhibit P for identification.

(The document above-referred to was marked Respondent's Exhibit P for identification.)

Q. (By Mr. Constable): Mr. Leh, I show you what is marked as Exhibit P. Do you know what that document is? A. Yes.

Q. Is your signature affixed to Page 2?

A. Yes, that is my signature.

Q. Now, this document is a transmittal, is it not, by The Progress Company to Mr. Vander Horst of your file concerning the termination of your distributor's agreement? Is that not correct?

A. That is correct.

Q. On Page 2, you tell Mr. Vander Horst, do you not, that the file sets forth the conclusion of your gasoline distributorship and termination of your sales in the retail business from Olympic Refining Company? A. That is right.

(Testimony of Marc D. Leh.)

Q. This document refers to the distributor's agreement, does it not? [56]

A. It refers to our file concerning the termination of our distributor's agreement, which consists of the following, and enumerates the financial transaction. It refers to a file of our distributor's agreement.

Q. What distributor's agreement is it that you are referring to in this letter, Mr. Leh?

A. I would presume I was referring to the entire file of all of our agreement or multiplicity of agreements with the Olympic Refining Company, because I sent our whole file to him, according to this letter.

Q. Does it not also purport to contain data in connection with Olympic Progress Oil Company?

A. Yes.

Q. In fact, Mr. Leh, was not the contracts between The Progress Company and Olympic Progress Company with Olympic Refining Company bundled pretty much into one group of contracts and transactions? A. No, sir.

Q. Well, now, why is The Progress Company purporting to handle the affairs here of the Olympic Progress Company?

A. Because I was one of the principal stockholders of the Olympic Progress Oil Company.

Mr. Constable: I will offer Exhibit P into evidence, your Honor.

Mr. Beek: We will object to the introduction of [57] Exhibit P on the grounds that it purports only

(Testimony of Marc D. Leh.)

to be a letter of transmittal from petitioner to his accountant. It doesn't purport to accurately describe the nature of the documents which were enclosed therewith, and those documents are the best evidence of their contents. It is immaterial.

The Court: I will receive it in evidence for whatever it may be worth.

(The document heretofore marked Respondent's Exhibit P was received in evidence.)

Mr. Beek: We will stipulate that this is a true copy.

Mr. Constable: Will you mark this?

The Clerk: Exhibit Q for identification.

(The document above-referred to was marked Respondent's Exhibit Q for identification.)

Mr. Constable: Respondent offers to stipulate that Exhibit Q for identification is a true copy of a certificate of resolution by the Olympic Refining Company.

Mr. Beek: So stipulate.

The Court: Are you offering it?

Mr. Constable: Your Honor, yes, I will offer it at this time.

Mr. Beek: No objection, your Honor.

The Court: Admitted.

(The document heretofore marked Respondent's Exhibit Q was received in evidence.)

Mr. Constable: Will you mark this?

The Clerk: Exhibit R for identification.

(The document above-referred to was marked Respondent's Exhibit R for identification.)

(Testimony of Marc D. Leh.)

Mr. Beek: May I show the document to the witness?

Mr. Constable: This would be off the record, if we may.

The Court: Off the record.

(Discussion off the record.)

The Court: On the record.

Mr. Constable: The respondent offers to stipulate that Exhibit R is a true copy of the minutes of the Board of Directors' meeting of the Olympic Progress Oil Company.

Mr. Beek: So stipulate.

Mr. Constable: And I will offer it into evidence, your Honor.

The Court: It will be received.

(The document heretofore marked Respondent's Exhibit R was received in evidence.)

Q. (By Mr. Constable): Mr. Leh, when the Olympic Refining Company and The Progress Company and the Olympic-Progress Company entered into the mutual termination agreement, Exhibit 8-H, which of these companies initiated the negotiations? A. Olympic Refining Company.

Q. Was The Progress Company interested in getting out of the Oil Business?

A. It is difficult for me to answer. "Getting out of the oil business," what is meant by that? Did we have our oil activities up for sale?

Q. Was The Progress Company interested in terminating its activities in connection with the sale of gasoline as it had been in the past?

(Testimony of Marc D. Leh.)

A. No.

Q. Was The Progress Company in the retail distribution of gasoline? Would that be a description of its function?

A. I don't believe it would. They were selling gasoline to retailers. That is a matter of definition from one oil man to another, but I would say that we were buying gasoline at wholesale and selling to retailers and other wholesalers.

Q. In 1950, was The Progress Company interested in getting out of any phase of the oil business?

A. Not prior to the negotiations with the Olympic Refining Company.

Q. After the Olympic Refining Company initiated the negotiations for the termination agreement known as Exhibit 8-H, did The Progress Company then become interested in getting out of the oil business? A. Yes. [60]

Q. What caused this change of mind?

A. The possibility of sale of the supply contract in the form as they use it, "termination agreement."

Q. Well, then, the termination agreement itself, that was the motive for The Progress Company wishing to get out of the oil business, is that correct? A. No, it is not correct.

Q. What, other than the contract, was involved?

A. It was a cash consideration.

Q. Were there any other factors, other than the cash consideration and the mutual termination

(Testimony of Marc D. Leh.)

agreement, which prompted The Progress Company to terminate its activities in the oil industry?

A. I commented yesterday that at the time you enter in a supply contract with a supplier, the buyer immediately tries to get a lower price and the seller tries to get a higher price, and a conflict takes place constantly. There were matters that were discussed; as to what substance they had in the form of valuation, I can't place on them. The only valuation of this termination or sale agreement that appealed to me was the possibility of realizing for the total contract some \$200,000, when, in my opinion, we had reached an economic peak as to the value of the supply contract.

Q. I believe you testified that Olympic Refining Company paid a sum total of \$215,000 for the termination of [61] contracts with The Progress Company and Olympic Refining Company, is that correct?

A. Yes. They paid \$215,000 in accordance with this exhibit marked 8-H.

Q. I think you also testified that these amounts were divided \$183,000 to The Progress Company and \$31,000 odd, to Olympic Progress Company.

A. That is correct.

Q. How was that split made, Mr. Leh?

A. In direct ratio to the gasoline under the contract. Would you like to have me illustrate that?

Q. No. That is sufficient.

Referring to Exhibit 4-D, I notice that the quan-

(Testimony of Marc D. Leh.)

tity of gasoline is two and one quarter million gallons. A. Yes.

Q. Is that per month or per year or for what period of time?

A. Per month, because it specifies in the General Petroleum contract, of which this is part of an assignment, "Per month." The quantity is named per month in here.

I can't locate it right now, but it is per month.

Q. Referring to Exhibit 2-B and to Page 4 therein, what are the total gallons of gasoline which are to be sold under Exhibit 2-B?

A. 350,000 gallons per month. [62]

Q. Are you referring now to Page 4?

A. Yes, sir.

Q. Are you making a computation from Paragraph 6?

A. No. It says, "Distributor shall take deliveries in fairly even monthly quantities,"—well, yes. You are talking annually. The other you wanted by the month. That was the reason I was carrying this other by the month.

Q. Will you explain what is meant by Paragraph 6 of Exhibit 2-B?

A. Well, I think the paragraph speaks for itself. The total shall be taken in fairly even monthly quantities of 4,200,000 gallons per year, or 350,000 gallons per month. That is the reason that I made that calculation.

Q. Therefore, the split of \$183,000 and \$31,000

(Testimony of Marc D. Leh.)

is made on the ratio of the gallonages which we have just been referring to, is that not correct?

A. That is correct.

Mr. Constable: Will you mark this?

The Clerk: Exhibit S for identification.

(The document above-refererd to was marked

Respondent's Exhibit S for identification.)

The Witness: On this ratio—may I offer a statement—that the quantity of gasoline under the 2,250,000, if you will recall my testimony yesterday, I kept referring to 2,025,000, because that was the quantity that [63] was given us after the Olympic Refining Oil Company exercised their option to take down the ten per cent, so the quantity would not be 2,250,000 to 350,000 to arrive at this ratio, but 2,025,000. I believe that is the figure. Anyway, it was ten per cent less than the 2,250,000.

Q. (By Mr. Constable): I show you what is marked Exhibit S, Mr. Leh, and ask you if you know what it is.

A. Yes. That is my signature, and I remember the letter.

Q. Your signature is on Page 2? A. Yes.

Q. This letter refers, does it not, to certain of the contracts which are shown by the exhibits in this case? A. Yes.

Mr. Constable: I will offer Exhibit S into evidence, your Honor.

Mr. Beek: Objected to as immaterial, your Honor.

Mr. Constable: Your Honor, respondent is con-

(Testimony of Marc D. Leh.)

cerned about the wording in Paragraph 4 of the letter wherein Mr. Leh, for The Progress Company, makes certain statements concerning The Progress Company's attitude towards getting out of the retail distribution of gasoline.

The Court: Admitted.

(The document heretofore marked Respondent's Exhibit S was received in evidence.) [64]

Q. (By Mr. Constable): Mr. Leh, with regard to the payment of \$215,000, as I understand, The Progress Company owed Olympic Refining a certain sum of money, is that not correct, on or about the date of the termination of these contracts?

A. Yes, I believe that is true.

Q. When you refer to a payment, actually what occurred was that there was simply a credit given on Olympic Refining Company's books for the amounts set out in the termination agreement shown as Exhibit 8-H, is that right?

A. Yes, that is true, but the net result is that \$215,000 passed between the two parties or the three parties.

Q. Do you know how much was owed by The Progress Company and how much was owed by Olympic Progress Company at the termination date?

A. I do not recall at this time, except that it was probably a combined figure of around \$250,000.

Q. How did that figure arise, Mr. Leh?

A. How did it arise?

Q. Yes.

(Testimony of Marc D. Leh.)

A. I suppose as a result of billing from Olympic Refining Company.

Q. Exhibit 8-H, which you have before you, refers to an assignment—looking at the last paragraph on Page 1—assignment of a contract dated October 20, 1947, known as the [65] distributor's agreement, which is Exhibit 2-B. That refers to the assignment of that contract by The Progress Company to the Olympic Progress Oil Company, is that not correct? A. That's correct.

Q. Now, that was a written assignment, wasn't it, Mr. Leh? A. I believe it was, sir.

Q. Do you have a copy of that assignment in court? A. No, I do not.

Q. What was paid for that assignment?

A. None that I can recall.

Q. Was there any sum of money paid?

A. Not to my knowledge.

Q. Referring to all of these agreements with the exception of Exhibit 8-H, there was no money paid at the inception of any of these agreements, with the exception of Exhibit 8-H, isn't that correct?

A. I am a bit confused. No money paid for what?

Q. There was no consideration in the inception of the contract, other than the mutual promises of the parties?

A. Well, I don't know what consideration is, but we signed an agreement, and Olympic Refining Company signed an agreement, for the purpose of going into business, the petroleum business.

(Testimony of Marc D. Leh.)

Q. Referring to Exhibit 2-B, the distributor's [66] agreement, did either of the parties at the inception of this agreement pay the other any sum of money? A. As currency, no.

Q. Was money paid in any other form than currency?

A. The reason that I say that is that to me, that when this contract became operative, we paid them money as a result of this contract. I don't—we didn't actually pay them for the privilege of signing this contract. I think the contract speaks for itself.

Q. You paid them for the gasoline which was to be sold under that contract, isn't that correct?

A. That is correct.

Q. Referring to Exhibits 4-D and 5-E, were there any sums paid at the inception of these agreements or this agreement?

A. No, sir. It must be remembered at this time that gasoline was plentiful and sellers were looking for buyers.

Mr. Constable: That is all I have, your Honor.

Mr. Beek: If it please the Court, we have a few questions on redirect.

Redirect Examination

Q. (By Mr. Beek): Mr. Leh, in the conduct of these negotiations to which there has been testimony, who acted on behalf of The Progress Company? A. I did. [67]

Q. Did Mr. Brown act on behalf of The Prog-

(Testimony of Marc D. Leh.)

ress Company in these matters? A. No.

Q. Mr. Leh, can you tell us, in general terms, why you made the deal which consummated in Exhibit 8-H, the mutual termination agreement?

A. After the offer by the Olympic Refining Company to purchase our supply contract, or, as they referred to it, the termination agreement, it was my belief that this contract had reached its economic peak, and that the cash consideration, which I testified started out negotiations at \$600,000 and finally ended at \$215,000, was attractive to us, and for that reason we sold.

Q. Did you ever think about—or did you ever consider selling that supply contract to anyone else? A. Yes, I did.

Q. To whom? A. Eagle Oil Company.

Q. How far did negotiations progress in that direction?

A. Not past the preliminary stage, because Eagle Oil Company's cash position was too weak to entertain the proposal.

Q. What did you think was the market value of your supply contract in the market? [68]

A. \$215,000.

Q. You testified a few moments ago, Mr. Leh, that you picked up gasoline, or that your retailers picked up gasoline from Olympic Refining Company. Did Olympic Refining Company maintain a gasoline dump or terminal?

A. No. When I use the term "Olympic Refining Company," I was using it contractually as the

(Testimony of Marc D. Leh.)

title of the gasoline. We picked it up, I believe, at General Petroleum's refinery. I don't think the gasoline was transferred over to the Olympic Refining Company, and then we in turn picked it up there. I think it was General Petroleum's refinery where we physically obtained the gasoline.

Q. Now, Mr. Leh, I will ask you to look again at the mutual termination agreement, Exhibit 8-H, starting with the first "Whereas" clause on Page 1, that paragraph refers to an agreement. What agreement is that, Mr. Leh?

A. That agreement refers, in my opinion, to Exhibit 2-B.

Q. The next "Whereas" clause, Mr. Leh,—let's take the next two whereas clauses together—referring to certain letter agreements, which letter agreements are those, Mr. Leh?

A. That refers to 3-C, dated January the 14th, 1948, and refers to distributor's agreement 2-B, and then refers to another letter agreement canceling 3-C, and this cancellation [69] agreement is marked 6-F.

Q. That is the second "Whereas" clause to which you refer? A. Yes.

Q. Now, the third "Whereas" clause, Mr. Leh, refers to what?

A. That refers to 7-G, wherein the price clause of the distributor's agreement, 2-B, is amended, and refers to distributor's agreement 2-B. That is all.

Q. If you will look at the next "Whereas"

(Testimony of Marc D. Leh.)

clause, Mr. Leh, which is on the bottom of Page 1 and the top two lines on Page 2, will you read that clause to yourself, sir? A. Yes.

Q. Does that correctly state the fact?

A. Yes, it does.

Q. Will you tell us, sir, in your own language, what that clause says?

A. It says that the distributor's agreement known as 2-B, together with its amendments, were assigned to the Olympic Progress Oil Company by The Progress Company and/or David E. Brown and Marc D. Leh.

Q. Thank you. Will you please turn now to Page 3 of Exhibit 8-H, Paragraph 5 at the bottom thereof? Referring again to this matter of \$183,000 and the \$31,000 division, can you tell us, Mr. Leh, exactly—I don't ask you to [70] perform the calculation—but will you tell us exactly how those figures were arrived at?

A. Yes. You take ten per cent from 2,250,000, and I believe that leaves you 2,025,000 gallons. That is the monthly gallonage under the Progress agreement. To that you add 350,000 gallons, which is the amount under the distributor's agreement or 2-B. That gives you a total. That total, together with the individual amounts, represents \$183,000 and \$31,000 right to the penny.

Q. Mr. Leh, how did you arrive at the \$183,000 and \$31,000 from the total? You testified that you arrived at a total amount of gasoline.

(Testimony of Marc D. Leh.)

A. You have 1,375,000 gallons, if my mental calculation is correct.

Q. You mean two million?

A. 2,375,000 gallons. 2,025,000, as a percentage of that total in relation to \$215,000, gives you exactly \$183,330.50.

Q. Thank you, Mr. Leh.

The Court: In other words, you have a fraction in which the numerator is 2,025,000 and the denominator is 2,375,000?

The Witness: That is correct.

The Court: And that is multiplied by 215,000, and the result of that is the \$183,000 figure that you just spelled out? [71]

The Witness: That is correct.

Mr. Beek: Well said, your Honor.

Q. (By Mr. Beek): I am handing you now Exhibit S in evidence, and direct your attention to Paragraph 4 on the first page thereof.

A. Yes, sir.

Q. Will you explain what that paragraph means in relation to your previous testimony, and the background of that letter?

A. I testified this morning that we were not interested in getting out of the retail distribution of gasoline until negotiations had commenced by the Olympic Refining Company, and this Paragraph 4 is in support of that testimony. This letter is written under date of July 22, 1952, some two years after the sale that is described in 8-H.

(Testimony of Marc D. Leh.)

Mr. Beek: We have no further questions of this witness, your Honor.

Mr. Constable: Just one question, your Honor.

Recross Examination

Q. (By Mr. Constable): Referring to Exhibit 8-H, Mr. Leh, to the last paragraph on Page 1, to the assignment referred to therein, do you know the date that that assignment took place?

A. I can't answer that, Mr. Constable, other than sometime in the early part of 1948. [72]

Mr. Constable: That is all that I have, your Honor.

The Court: Exhibit 5-E, as I read it, The Progress Company is given the benefit of any extensions that Olympic Refining Company might make with General Petroleum?

The Witness: That's right.

The Court: At the same time, however, The Progress Company binds itself to make certain payments to Olympic Refining Company in the event that The Progress Company obtains some other source of supply for its gasoline? That is the second paragraph.

The Witness: That is correct, yes.

The Court: I presume that one of the items of consideration that entered into Exhibit 8-H, the termination agreement, was that your company was going to be relieved of the obligations of the second paragraph of Exhibit 5-E?

(Testimony of Marc D. Leh.)

The Witness: I would believe so. I don't know whether——

The Court: It was a package deal, I take it; that was one of the elements, so that if, at any later time, The Progress Company did wish to obtain sources of gasoline other than from Olympic Refining, it was free to do so?

The Witness: Yes, that is my understanding.

The Court: Whereas, it would not have been free to do so prior to that time unless it paid the penalty of a [73] half cent per gallon to Olympic?

The Witness: That's right. It is my opinion that we, in including this 8-H, included everything with the Olympic Refining Company, including 5-E.

Mr. Beek: We have no further questions, your Honor.

The Court: You are excused.

(Witness excused.)

Mr. Beek: We will call Mr. Butterworth.

Whereupon,

L. MARK BUTTERWORTH

called as a witness for and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your name and address.

The Witness: My name is L. Mark Butterworth. My home address—is that what you want?

The Clerk: Yes.

The Witness: 393 Flintridge Drive, Pasadena.

Direct Examination

Q. (By Mr. Beek): What is your occupation, Mr. Butterworth?

A. I am with General Petroleum in the marketing department. My particular capacity is that of manager of gasoline and fuels. [74]

Q. How long have you been engaged or employed in the marketing of gasoline and petroleum products?

A. Well, I have just been reminded that it is in excess of 30 years.

Q. In what capacity have you been employed by General Petroleum Corporation since 1948?

A. Since 1948, under a title of assistant general manager, marketing department, and then in my present capacity as manager of gasoline and fuels.

Q. In your capacity as manager of gasoline and fuels, are you familiar with the various supply contracts or commitments of General Petroleum Corporation in the Southern California area?

(Testimony of L. Mark Butterworth.)

A. By supply contracts——

Q. Using the term broadly.

A. I want to be sure I understand what you refer to by “supply contracts.”

Q. Well, you are familiar, or are you familiar with the marketing procedures of your company, generally, in the Southern California area?

A. Yes, and I would be familiar with marketing department supply contracts.

Q. I understand. Are you in your capacity familiar with the market conditions in petroleum products, generally? By that I refer to supply and demand and other market variables. [75]

A. Yes. I have to be, of course.

Q. Now, Mr. Butterworth, did your company, meaning General Petroleum Company, sell gasoline to the Olympic Refining Company during the period from 1945 until 1950? A. It did.

Q. Could you give us your description of the market conditions in the gasoline market as you saw them during that period of years up to and including the start of the Korean War?

A. Did you say 1945?

Q. From 1945 until 1950. In other words, between the end of World War II and the commencement of the Korean conflict.

A. Well, immediately, or at the conclusion of the second world war, we believed, as did the majority of others, I think, that there would be a very definite slackening of industry here on the west coast occasioned by the aircraft and ship building industries being suspended, as we thought

(Testimony of L. Mark Butterworth.)

at the time. The indication seemed to point to the fact that there would be a surplus of petroleum products, and as a consequence of that, General Petroleum entered into certain supply agreements in the year 1945 and 1946. We did not, however, guess correctly—neither did anyone else, apparently—and other than a slight slackening of business following the close of World War II, we found that our increase in population [76] came into being, industrial development began to occur, and starting in late 1947 or early 1948, we in General Petroleum began to feel the pinch of supply, and that condition, a shortage of supply, became progressively worse from 1948 into 1949, still worse in 1950, and worsened from then on.

Q. With reference now to the market commitments or supply contracts which General Petroleum had entered into during the period you described of 1945 and 1946, what action or attempted action did General Petroleum take to meet the short supply situation which you described in 1948, 1949 and 1950 and thereafter?

A. Well, it was perfectly obvious that our first obligation was to supply the people with whom we had contracts and those with whom we did not have contracts, as a matter of fact. I am including now our distributors, some of whom are contracted and some of whom are not, and then, of course, our direct operations through our salaried operations, which are the terminal points like Los Angeles, for example.

(Testimony of L. Mark Butterworth.)

During that period of time, then, in order that everyone of our customers might receive their fair share of the products that we had available, it was necessary for us to see that contract maximums were not exceeded. We did that to the best of our ability. In addition to that, we took occasion to attempt, at least, to limit quantities under supply contracts by negotiating with some of the people with [77] whom we had contracts, in an effort to reduce quantities. I might say in that regard, we were not very successful.

Q. Referring specifically now to the Olympic Refining Company, did you in 1950 negotiate with the Olympic Refining Company in this regard?

A. Yes.

Q. Who conducted the negotiations between your company and Olympic Refining Company?

A. For the marketing department, I was the liaison person representing, of course, my principals.

Q. You personally handled the negotiations?

A. Yes.

Q. What was the outcome of those negotiations, Mr. Butterworth?

A. The outcome of the negotiations that we had with Olympic Refining resulted in the payment to them of an excess of \$200,000 for the cancellation of our supply contract, as we call it, with Olympic Refining, and the negotiation also included the entering into a new contract with Olympic Refining.

(Testimony of L. Mark Butterworth.)

Q. Was that new contract substantially smaller in amount?

A. It was exactly half. Quantities were reduced 50 per cent.

Q. I show you now Exhibits 9-I and 10-J, and ask you [78] if you are familiar with them, Mr. Butterworth.

A. Yes, I am familiar with them—or with this ones, pardon me.

Yes, I am familiar with both of these.

Q. And you have just testified that a new deal was made with Olympic. Do those documents represent the consummation of your negotiations and the making of a new deal?

A. Yes, they do.

Q. Directing your attention, Mr. Butterworth, to the fifth and sixth lines—excuse me—the first and second lines of this document, Exhibit 9-I, the payment of certain sums of money referred to there, do you know how much that payment was?

A. Yes. It seems to me—this is very close to the exact amount—the amount of money paid was about \$237,000.

Q. And that is the amount that you testified to a moment ago as being in excess of \$200,000?

A. Yes.

Mr. Beek: Thank you. I have no further questions of this witness.

Mr. Constable: No questions.

The Court: You are excused.

(Witness excused.)

The Court: There will be a recess.

(Short recess taken.)

Mr. Beck: The petitioner will now call Mr. Jack M. Jessen. [79]

Whereupon,

JACK M. JESSEN

called as a witness for and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please state your name and address?

The Witness: Jackson M. Jessen, 811 West Seventh Street.

Direct Examination

Q. (By Mr. Beck): What is your occupation, Mr. Jessen? A. Attorney at law.

Q. Were you in private practice in 1950?

A. No. I was in the legal department of General Petroleum Corporation.

Q. What was your official designation with General Petroleum Corporation?

A. At that time I was secretary of the corporation and also assistant counsel in the legal department.

Q. How long were you with General Petroleum Corporation? A. About 22 years.

Q. I would like to show you, Mr. Jessen, Exhibits 1-A, 9-I and 10-J, and ask you whether you are familiar with these documents. [80]

A. Yes, sir. I have seen copies of these before. These are photostatic copies.

(Testimony of Jack M. Jessen.)

Q. Did you write or dictate Exhibits 9-I and 10-J?

A. Apparently I dictated 10-J, because it has my initials on it and my secretary's initials at that time, showing it was dictated on July 24, 1950. 9-I was apparently dictated by Olive E. Boswell, a member of the law department at that time. It shows her initials and Miss Cooney's, her secretary's initials, on 9-I.

Q. I will show you now Exhibit 8-H and ask you if you are familiar with the document.

A. Yes. I saw this agreement in discussions with Mr. Paradise, who was representing Olympic Refining Company.

Q. You were familiar with 8-H at the time you dictated 9-I and 10-J?

A. Yes. That was taken into consideration in the preparation of both 9-I and 10-J.

Q. Now, if you will, Mr. Jessen, will you describe briefly the business background and the significance of the transaction which is represented by these documents?

A. Well, in 1950, when these various instruments were prepared, Mr. Butterworth of the marketing department advised that due to shortage of supply of General Petroleum Corporation, they were seeking other supplies, and in connection with that, they looked at their present existing contracts with buyers [81] with the view of trying to repurchase some of that supply in order to re-

(Testimony of Jack M. Jessen.)

lieve the shortage of supply the General Petroleum was faced with at that time.

Mr. Constable: I am going to object and move that that answer be stricken. Up to this point, I haven't objected to terminology that has been used. There is some question about whether these contracts, whether they are terminated or whether they are sold or whether there is a rescision. Now, Mr. Jessen referred to this contract, the cancellation of it or the termination of it in terms of 'a sale or purchase. Now, I am making the objection on the grounds that it is a conclusion, and that the termination of the agreement should be described as it factually occurred and not as a conclusion of law as to whether there was a purchase or sale of it.

The Court: I will not be bound or mislead by the terminology of the witness. I will interpret his testimony in the light of the evidence that is before the Court.

Mr. Beek: If the Court please, we are agreeable to striking any objectionable terminology, but we don't feel that the entire testimony should be stricken on that ground.

The Court: I won't strike any of it.

Q. (By Mr. Beek): Will you continue, Mr. Jessen, with the narrative which you were giving us?

A. Well, Mr. Butterworth came to my office and said [82] that he had—that he was negotiating with the Olympic Refining Company to purchase a certain amount of the supply called for under

(Testimony of Jack M. Jessen.)

their contract, and had arrived at a figure, as I recall, at that time, of around \$235,000 that they were going to pay for that repurchase and reduction in the quantity then committed under the prior agreement.

In connection with that, Mr. Paradise of Olympic Refining Company had various conferences with me, pointing out that they had to—in connection with the resale to General Petroleum, been relieved of their contractual commitment to The Progress Company, and pending a satisfactory deal with Progress Company, then they would be in a position to execute the documents with General Petroleum.

Q. Thank you. Now, do I understand your testimony to be that there was a payment of cash in connection with these documents, in connection with this transaction?

A. That is my understanding, that a cash payment in the sum of approximately \$235,000, or some sum in that field, was paid by General Petroleum to Olympic Refining Company at the time these various documents were executed.

Q. Did you know the purpose of that payment?

A. It was consideration for the repurchase of the gasoline, the quantity of gasoline which we were buying back from Olympic and being relieved of our contractual commitment to supply that amount. [83]

The Court: You don't mean that you were repurchasing the gasoline?

(Testimony of Jack M. Jessen.)

The Witness: Yes, sir.

The Court: You mean that you were being relieved of the obligation to supply gasoline in the future?

The Witness: We were being relieved of the quantity of our contractual obligation to supply that quantity, but we needed that quantity to supply to other customers.

The Court: I understand. So physically you weren't repurchasing gasoline?

The Witness: Well, my construction is that we were.

Q. (By Mr. Beek): Well, Mr. Jessen, the transaction didn't involve the purchase of a specific number of gallons of gasoline, did it, a present existing quantity?

A. No. It involved a repurchase of a commitment to deliver X quantities of gasoline over X period of time.

Q. I think we understand. Do you recall now, Mr. Jessen, how large a reduction in quantity was negotiated and concluded by these contracts?

A. My recollection is that it involved some 200 or 225,000 gallons of gasoline per month—oh, no—two million and a quarter gallons of gasoline per month.

Q. You were familiar in a general way with the [84] contract between the Olympic Refining Company and The Progress Company?

A. In general, yes.

(Testimony of Jack M. Jessen.)

Q. Did you know the quantity called for by that contract?

A. It was my understanding from conversations with Mr. Paradise that it involved some two million and a half to 2,750,000 gallons a month.

Q. Would such a contract have a market value?

A. In my opinion, yes.

Q. Would such a market value be substantial, or would such a contract—strike the first question.

Would such a contract be salable for cash?

A. It would all depend upon the circumstances existing at the time. Now, in 1950, when practically all suppliers on the Pacific Coast were short of supply, any supply contract of a substantial amount would have quite a market value, in my opinion, at that particular time.

Mr. Beek: I have no further questions of this witness, your Honor.

Mr. Constable: One question, your Honor.

Cross Examination

Q. (By Mr. Constable): Under this contract which General Petroleum had with Olympic Refining, was there, at the time of the [85] termination, any gasoline to be repurchased under the termination agreement?

A. I don't know quite what you mean by termination agreement.

Q. Well, you were contemplating an agreement whereby you would terminate your relations after Exhibit 1-A, is that correct?

(Testimony of Jack M. Jessen.)

A. No. We were not terminating all of our obligations under 1-A.

Q. You were terminating some of them?

A. We were partially terminating in order to be relieved of a commitment to supply the total quantity. We were reducing the commitment to a lesser quantity.

Q. That's correct. Now, you were not contemplating repurchasing any gasoline physically?

A. Well, the gasoline wasn't in existence, because we didn't have it. That's why we were trying to reduce our commitment.

Q. Had the gasoline been sold to Olympic Refining as yet?

A. We had a contractual agreement to supply them, so we had to get the gasoline to supply them under that contract.

Q. You had a contract to sell, not a contract of sale?

A. Definitely, and if we had not lived up to it, we would have been liable for breach of contract and damages. [86]

Q. You would have been liable for money damages, not for the gasoline?

A. Definitely.

Mr. Constable: That is all.

Mr. Beek: Nothing further.

(Witness excused.)

Mr. Beek: The petitioner will call Harold Steitz.

Whereupon,

HAROLD J. STEITZ

called as a witness for and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and address for the record, please.

The Witness: Harold J. Steitz, 626 East Menacino Street, Altadena.

Direct Examination

Q. (By Mr. Beek): What is your occupation, Mr. Steitz?

A. Vice president of the Olympic Refining Company.

Q. How long have you been associated with the Olympic Refining Company?

A. Since the latter part of 1946.

Q. In your capacity as vice president, what, if any connection do you have with the marketing functions of Olympic [87] Refining Company?

A. I am in charge of the marketing operations.

Q. Have you been in charge of marketing operations since you joined Olympic Refining Company?

A. Yes, I have.

Q. During the years subsequent to the time you joined Olympic Refining Company through the year 1950, from whom, if anyone, did Olympic Refining Company buy gasoline?

A. General Petroleum Corporation.

Q. I show you now Exhibits 4-D and 5-E, and ask you if you are familiar with those documents?

(Testimony of Harold J. Steitz.)

A. Yes, I am familiar with them.

Q. Your signature appears on both those documents, does it not? A. Yes, it does.

Q. Could you now tell us briefly the business background leading to the execution of those letters that you have before you?

A. Well, we had a supply contract from the General Petroleum Corporation which entitled us to take three and a half million gallons of gasoline per month, and I believe that we had been successful in marketing some million or million and a quarter, or some such figure as that. We were not taking the entire supply, and obviously, of course, we wished to sell it and gain the profit from it, and for that [88] reason we made this contract with The Progress Company, Mr. Leh and Mr. Brown.

Q. You used, then, The Progress Company as an outlet for your gasoline, did you not?

A. That is right.

Q. Mr. Steitz, did your company handle physically the gasoline that was sold to The Progress Company under those contracts?

A. No, we did not. The gasoline was taken at the refinery of General Petroleum, which was our supply point.

Q. Did you arrange for the pickup and delivery of that gasoline or not? A. No.

Q. I show you now Exhibit 8-H, which is captioned "Mutual Termination Agreement," and ask if you are familiar with that document.

A. Yes, I am familiar with this.

(Testimony of Harold J. Steitz.)

Q. Your signature is affixed thereto, is it not?

A. Yes, it is.

Q. What consideration was paid to The Progress Company and to the Olympic Progress Company under that contract, do you recall?

A. I believe it was \$215,000.

Q. Where did that money come from, Mr. Steitz?

A. From General Petroleum Corporation. [89]

Q. Subsequent to the execution of that mutual termination agreement, was there any change in your contract with General Petroleum Corporation?

A. Yes, it was reduced, the quantity was reduced.

Q. I would like you to look at Exhibits 9-I and 10-J, Mr. Steitz, and ask you if you are familiar with those documents?

A. I am familiar with 9-I. Yes, I am familiar with 10-J, also.

Q. Thank you. Do those documents, 9-I and 10-J, reflect the new arrangement between your company and General Petroleum?

A. Yes, they do.

Mr. Beek: I have no further questions of this witness, your Honor.

Mr. Constable: No questions.

The Court: You are excused.

(Witness excused.)

Mr. Beek: May we have a moment, your Honor, to converse?

The Court: You may.

Mr. Beek: The petitioner will rest, if your Honor please.

The Court: Before I ask the government if it wishes to put on any rebuttal testimony, I am going to ask Mr. Brown if he has any evidence that he wishes to present. [90]

Mr. Brown: Well, I don't know who is going to ask me the questions, of course——

The Court: If you have any testimony of your own, you may take the witness stand and be sworn in, and I will permit you to give your testimony to the Court in narrative form.

Whereupon,

DAVID E. BROWN

called as a witness for and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Court: I will allow both counsel for the government and counsel for the Petitioners in this case to interrogate you at the conclusion of your testimony, if they so desire.

The Witness: In other words, I am just to say what I believe, is that it, or is someone going to question me?

The Court: You may give such testimony as you feel should be before the Court, taking into account everything that has been placed before the Court already, which is in evidence and applicable to your case as well as to the other docket number.

(Testimony of David E. Brown.)

The Witness: Well, I'd say this: That reviewing—or hearing the testimony of all that was on the stand, I was brought into this picture by Mr. Leh and with Mr. Steitz, vice president of the Olympic Refining Company, and had very little [91] to do with the original negotiations on the purchase of gasoline from Olympic Refining Company, during the time when gasoline was hard to get either by General Petroleum or Olympic Refining Company—we had lots of trouble in getting any gasoline from Olympic Refining Company. Why, I don't know. I heard today that it was due to a shortage. I don't know.

I left, I would say, the Progress Company office, or the Los Angeles office, to go over the farm interests that Mr. Leh and I had in Coachella Valley, and prior to my leaving for the ranches, there was some discussion in my presence with Harold Steitz and Mr. Leh, and it was to the effect to sell our contract. I might have been in two or three of those conversations.

About five or six months, as I say, after I left for the ranches, Mr. Leh called me at Coachella Valley and told me he had negotiated a deal with Harold Steitz, and the price was \$275,000. He called me back, I would say, in about one hour, and he said, "They won't pay \$275,000."

He asked me what the least that I would be willing to take was, and I believe they reduced the price, Olympic Refining Company, under \$200,000, and my answer to Mr. Leh was \$215,000. Mr. Leh

(Testimony of David E. Brown.)

phoned me in about an hour or two hours that evening, and said that they had accepted; the papers were drawn, Mr. Leh sent for me to come back, and we went over to Mr. Paradise's office with Mr. Steitz—I think Mr. Paradise [92] was alone in his office—it was Mr. Steitz, Mr. Leh and myself, and the papers were all finished ready for our signatures.

Now, another thing I would like to clear is the Olympic Progress Oil Company's contract. It was my understanding that they did have 300 to 350,000 gallons. Mr. Leh or myself had nothing to do with the running of the Olympic Progress Oil Company. It is true—it is a fact that we owned together 76 per cent of the stock, but the business was run by Mr. Lee Orr and Boyd Rogers.

Mr. Leh had told me that he had discussed the sale of the contract with Mr. Orr and Mr. Boyd Rogers, and when I returned from the ranch, I asked Mr. Orr and Rogers if they were satisfied with \$215,000. They knew also what we were getting.

I just wanted to say that, your Honor, because I think there was confusion about the Olympic Progress, whether we actually dictated the policies.

I don't think I have anything else.

The Court: Does that complete your testimony?

The Witness: Yes.

The Court: Mr. Constable, do you have any questions you would like to put to the witness?

(Testimony of David E. Brown.)

Mr. Constable: Yes. I have a couple of questions. [93]

Cross Examination

Q. (By Mr. Constable): Mr. Brown, you referred to some trouble in getting gasoline from Olympic Refining Company during your testimony. Do you recall that testimony? A. Yes.

Q. Do you know what that trouble was?

A. No. All I know is that the Olympic—Mr. Steitz had said many times that he was having trouble with General Petroleum.

Q. Was the trouble in the form of any claims on The Progress Company by the Olympic Company?

A. I don't think so. I think the trouble was because we were cutting the prices.

Q. What did they purport to do about that?

A. Couldn't get the gasoline.

Q. Who couldn't get the gasoline?

A. Olympic Refining Company.

Q. I don't understand your statement. You say Olympic Refining Company could not get the gasoline?

A. That's what they said, that they were cut down. The records will show that we weren't taking as much gasoline as previous. There was a shortage of gasoline.

Q. Weren't you entitled to take a certain amount under your contract? [94] A. Yes.

Q. And you were given less than that amount?

A. At times.

(Testimony of David E. Brown.)

Q. Didn't The Progress Company ask Olympic Refining Company for their maximums under the contract? A. Yes, sir.

Q. What did Olympic Refining say?

A. They go to General Petroleum, they couldn't do anything about it.

Q. Certainly The Progress Company had some sort of claim against the Olympic Refining Company?

A. That's the claims I believe were referred to by Mr. Leh, that you asked him about.

Q. Were those claims covered in the termination agreement that you——

A. I believe that Mr. Paradise included those claims, because Mr. Leh discussed the claims, said we were going to do something about it to Steitz, and Steitz in all probability told it to Paradise; when he drew up this so-called termination allowance or termination contract, he included any claims that Progress or that Olympic Progress Company would have. That is my understanding of it.

The Court: Now, do I correctly understand your testimony that The Progress Company had not been getting the full amount of gasoline that it was entitled to pursuant to its [95] contract with Olympic Refining Company, for one reason or another?

The Witness: That's right.

The Court: And that it therefore had some claim against Olympic Refining Company for its failure to receive the full contractual amount?

The Witness: That's right.

(Testimony of David E. Brown.)

Q. (By Mr. Constable): Mr. Brown, you mentioned that Mr. Leh had called you at a ranch somewhere concerning the offer made by Olympic Refining Company to terminate the contracts in question. You mentioned that—you said \$215,000. Do you recall that testimony now?

A. Yes. He told me two hundred seventy-five, and he came back and said he couldn't get it.

Q. And then you told Mr. Leh on the telephone that the bottom figure would be \$215,000, is that correct?

A. After he told me they wouldn't—I think the price was around one hundred seventy-five or \$190,000, and the least that I said that I would take would be \$215,000.

Q. When you said \$215,000, did you mean both on behalf of Progress Company and Olympic Progress Company? A. Yes.

Q. In other words, you regarded both the companies and contracts together in the \$215,000?

A. I believe that's right, yes.

Q. Mr. Brown, how did you arrive at your minimum, at the figure \$215,000? Was that an amount that was owing by you to Olympic Refining Company?

A. I wouldn't know that, sir.

Mr. Constable: Will you mark this?

The Clerk: Exhibit T for identification.

(The document above referred to was marked

Respondent's Exhibit T for identification.)

Q. (By Mr. Constable): Mr. Brown, I show

(Testimony of David E. Brown.)

you what is marked Exhibit T for identification, and ask you if your signature appears on Page 2?

A. Yes, that is my signature.

Q. Will you read to yourself, refresh yourself on the second paragraph on Page 2?

A. Yes, that's right.

Q. Does this letter, Mr. Brown, purport to explain how the figure \$215,000 was arrived at?

A. Not necessarily. You asked me what was the amount owed. I didn't know it when I was at the ranch. You are referring to a letter here to me—I mean that I wrote to the Regional Commissioner, Mr. Sears, here last month, and that letter refers to The Progress Company.

Q. In this letter, which is marked Exhibit T, you state, "We had no alternative but to sell the contract for [97] the unpaid balance that Olympic claimed we owed them."

What did you mean by that statement, Mr. Brown?

A. Well, right before that, you neglected to read that it was my understanding that General Petroleum did not—they didn't—you read the first part of that. I just don't recall——

(Exhibit handed to witness.)

The Witness: Yes. I say the Olympic Refining Company did not, in my opinion—in this case, as I understand it, the Olympic Refining Company did not sell their contract, nor did they terminate their contract with General Petroleum Corporation. They

(Testimony of David E. Brown.)

did, however, get an extension of the contract with General Petroleum Corporation.

Yes. "We had no alternative but to sell the contract for the unpaid balance that Olympic claimed we owed them."

Now, in other words, no check or moneys were paid to The Progress Company or to any other companies that Leh or Brown were interested in, nor to us, as individuals.

Mr. Constable: I will offer Exhibit T into evidence, your Honor.

The Court: Admitted.

(The document heretofore marked Respondent's Exhibit T was received in evidence.)

Mr. Constable: That's all I have.

Mr. Beek: May we ask a question or two of Mr. Brown, your Honor? [98]

The Court: You may.

Q. (By Mr. Beek): Mr. Brown, you testified that during the time prior to the execution in Mr. Paradise's office of Exhibit 8-H, you were out of town. Where were you at that time, Mr. Brown?

A. I was harvesting the crop in Dr. Forbes' ranches.

Q. Where are those located?

A. South of Indio about 17 miles.

Q. Did you have a place of residence at Dr. Forbes' ranches, Mr. Brown? A. Yes, sir.

Q. Do you recall now for how many months you stayed on the ranch?

A. Sometimes I'd go down there for 30 days and

(Testimony of David E. Brown.)

come back for four or five days, and then back again.

Q. Did you take part in any negotiations with the Olympic Refining Company or with Mr. Steitz relative to this matter under discussion?

A. I would say no.

Q. You left that to your partner, Mr. Leh?

A. Well, Mr. Leh and I discussed it, but, as I remember it, the final negotiations were between Mr. Leh and Steitz.

Q. Then if I understand you correctly, although [99] you and Mr. Leh discussed these matters between you, Mr. Leh conducted negotiations with Mr. Steitz and other third parties, is that correct?

A. I would say that is true.

Q. When those negotiations began, Mr. Brown, do you know whether or not The Progress Company was behind in making its payments to the Olympic Refining Company?

A. What is that again? Were they behind in the payments? What date are you speaking of?

Q. At whatever time negotiations for the sale or termination of this contract began.

A. Well, I wouldn't say so, because if we were taking two million times twenty cents—I believe the contract states the terms of payment—I think it was 30 days or the 10th of the following month, so if you took two million times twenty cents, it would be \$400,000, and as I see here, here is \$183,000, so in view of that, I wouldn't think that we were behind.

(Testimony of David E. Brown.)

Q. Thank you, Mr. Brown. Mr. Brown, I would like to call your attention to Exhibit 4-D in evidence, and to the first paragraph thereof numbered 1. Do you recall whether or not the shortage that you referred to was the ten per cent more or less which is referred to in this paragraph 1?

A. I wouldn't know that.

Q. You have testified a few moments ago that [100] sometimes you didn't get—that the Progress Company didn't get the full two and a quarter million gallons in a month, is that correct?

A. That's right.

Q. Would the shortage be ten per cent, as indicated in Paragraph 1, or do you know?

A. I wouldn't know that.

Mr. Beek: I don't think we have any further questions, your Honor.

Mr. Constable: May I have just one moment, your Honor?

Q. (By Mr. Constable): Mr. Brown, how did The Progress Company account for whatever liability it may have had to the Olympic Refining Company for gasoline supplied to The Progress Company?

A. I don't believe I understand your question. How did it account—

Q. Are you familiar with the books of The Progress Company? A. Not too familiar.

Q. Do you understand the liability sections of the general ledger account?

A. I would say I know something about it.

(Testimony of David E. Brown.)

Q. Did The Progress Company keep a running balance of the amount which it owed to the Olympic Refining Company under gasoline contracts?

A. I wouldn't know that. I didn't keep the books.

Mr. Constable: That's all I have.

The Court: Do you have any further testimony to give, Mr. Brown?

The Witness: No.

The Court: You may step down.

(Witness excused.)

The Court: I will now ask you whether you have any other testimony to present, apart from your own testimony?

Mr. Brown: No, I do not, your Honor.

The Court: Let me ask further whether the government has any evidence to present.

Mr. Constable: Nothing, your Honor.

The Court: Does the Petitioner have any rebuttal?

Mr. Beek: Your Honor, may we call Mr. Leh for one brief question, please?

Whereupon,

MARC D. LEH

recalled as a witness for and on behalf of the Petitioners, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

Mr. Beek: Is the witness still sworn, your Honor?

The Court: The witness has already been sworn.

(Testimony of Marc D. Leh.)

Q. (By Mr. Beek): Mr. Leh, you have heard the testimony of Mr. Brown concerning shortages of supply? A. Yes.

Q. Could you explain to us, or do you know what shortages of supply he refers?

A. It is my recollection that on or about April, May, June and July of 1950, the United States government was in a serious shortage on the Pacific Coast due to the Korean War threat, or if it had started—I am not quite sure of my dates—but the industry held a meeting at the Biltmore Hotel headed by Mr. Arthur Stewart, as chairman, for each one to give as much gasoline and petroleum products as they could, and under that agreement, or under that meeting, it may have been that we did not take the physical number of gallons of gasoline specified under the contract as a contribution toward the war effort. Now, I'd have to go back and refresh my memory as to actual dates and times, but in substance, that is the shortage that was on in the industry, and we participated in that.

Q. Do you recall whether this shortage with this situation entered into the negotiations leading up to the mutual termination agreement in any way?

A. No. The shortage may have created the economic value, but the shortage as shortage, no.

The Court: Apart from your acquiescence, did [103] Olympic furnish you with less gasoline than you were entitled to under your contract, and were you demanding that they live up to their contract?

The Witness: No.

(Testimony of Marc D. Leh.)

The Court: Were you getting less than the contract provided for?

The Witness: I believe there were several months where, in the situation as an industry, we were getting less than the contract provided for.

The Court: Then you did have a claim against them for the difference?

The Witness: No, not in my opinion, your Honor, for the reason that we made the contribution in the industry and not to Olympic.

Q. (By Mr. Beek): Mr. Leh, did that reduction come within the ten per cent provisions of your contract with Olympic?

A. It is my understanding it did.

The Court: If it came within the ten per cent, then there weren't any shortages under the agreement?

The Witness: Your Honor, I can't testify whether there were shortages under the agreement or not, but in the situation that existed in 1950, I do know that the industry, in connection with the government, asked for a participation of all people to make voluntary contributions of petroleum [104] products, and it took place on or about that time.

Q. (By Mr. Beek): Mr. Leh, did you ever at any time assert that you had a legal claim or a claim having a dollar value arising out of such shortages?

A. To Olympic Refining Company?

Q. To anyone. A. No.

(Testimony of Marc D. Leh.)

Q. One further question. Is any part of the consideration of \$215,000 in the mutual termination agreement attributable to this shortage which we have been discussing? A. No. [105]

* * * * *

[Endorsed]: T.C.U.S. Filed April 30, 1956.

[Title of Tax Court and Causes.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 59, inclusive, constitute and are all of the original papers, as called for by the "Designations of Contents of Record on Appeal", including Joint exhibits 1-A through 12-L, attached to the Stipulations of Facts, Joint exhibits 13-M and 14-N, attached to the Stipulation of Facts in Docket No. 53879, Joint exhibit 15-O in Docket No. 53878, Petitioners' exhibit 16, admitted in evidence, and Respondent's exhibits P through T, admitted in evidence, in the cases before the Tax Court of the United States docketed at the above numbers and in which the petitioners in the Tax Court have filed petitions for review as above numbered and entitled, together with a true copy of the docket entries in said Tax Court cases as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United

States, at Washington, in the District of Columbia, this 5th day of November, 1957.

[Seal] HOWARD P. LOCKE,
Clerk, Tax Court of the United
States.

[Endorsed]: No. 15797. United States Court of Appeals for the Ninth Circuit. Marc D. Leh and L. Waive Leh, Petitioners, vs. Commissioner of Internal Revenue, Respondent. David E. Brown and Christobel H. Brown, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petitions to Review Decisions of the Tax Court of the United States.

Filed: November 19, 1957.

Docketed: November 25, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15797

MARC D. LEH and L. WAIVE LEH,
Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Appellee.

DAVID E. BROWN and CHRISTOBEL H.
BROWN, Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Appellee.

STATEMENT OF POINTS

To: Paul P. O'Brien, Clerk of the United States
Court of Appeals:

Please Take Notice that pursuant to Rule 17 (6) of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit, Appellants in the above-entitled matter herewith present the points upon which they claim the Court erred:

Point I

In failing to find that, as a matter of fact, a certain amount, namely, \$183,330.50, received by the taxpayers' partnership during 1950, constituted proceeds of the "sale or exchange" of property.

Point II

In failing to find that, as a matter of law, said sum was taxable as long term capital gain under Section 117 of the Internal Revenue Code of 1939, and not as ordinary income.

Dated this 26th day of November, 1957, at Los Angeles, California.

/s/ JAMES L. WOOD,
Attorney for Appellants.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed November 27, 1957. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STIPULATION

It is hereby stipulated by and between the parties hereto through their respective counsel of record that the exhibits herein be considered by the Court in their original form without the necessity of their reproduction in the printed record.

Dated: December 9, 1957.

/s/ JAMES L. WOOD,
Attorney for Petitioners.

/s/ CHARLES K. RICE,
Assistant Attorney General,
Attorney for Respondent.

[Endorsed]: Filed Dec. 10, 1957. Paul P. O'Brien, Clerk.





